THE

EXECUTIVE POWER CASE.

THE

Attorney-General of Canada

VS.

The Attorney-General of Ontario.

Toronto:
PRESS OF THE BUDGET, 27 MELINDA STREET.
1892.

PREFATORY NOTE.

THIS was an action seeking a declaration that the Ontario Act, 51 Vict. Cap. 5, respecting the executive administration of the Laws of Ontario, is *ultra vires* of the Provincial Legislature.

A copy of the Act is appended.

The Chancery Division, composed of Boyd, C. and Ferguson and Robertson, J. J., decided in favor of its validity.

An appeal, argued before Hagarty, C. J. and Burton, Osler and Maclennan, J. J., by C. Robinson, Q.C., and Lefroy for the Appellant, and Edward Blake, Q.C., and Irving, Q.C., for the Respondent was dismissed.

This print of the argument in Appeal by Counsel for Ontario is from Mr. Nelson R. Butcher's excellent report, which the speaker has revised.

He regrets that time has not served him to condense it, by eliminating the frequent redundancies of phrase and reiterations of argument, which, however allowable and even essential in oral discussion, become alike needless and tedious in a printed dissertation.

Though sensible of its many imperfections, he has been encouraged by the interest taken in the prints of The Ontario Lands Case and the Provincial Offences and Procedure Case, to submit to the indulgent consideration of Canadian jurists and public men this attempt to investigate, from the Provincial point of view, the scheme of our Constitutional Act for the distribution of Executive power.

HUMEWOOD, TORONTO,
January, 1892.

51 VIC., CAP. 5, ONTARIO.

An Act respecting the Executive Administration of Laws of this Province.

WHEREAS by Section 65 of The British North America Act, 1867, it was provided (among other things) that all powers, authorities and functions under which any Act of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada or Canada, were before or at the union vested in or exercisable by the respective Governors or Lieuteuant-Governors of those Provinces should, as far as the same were capable of being exercised after the union in relation to the government of Ontario and Quebec respectively, be vested in and exercised by the Lieutenant-Governor of Ontario and Quebec respectively, subject, nevertheless, to be abolished or altered by the respective Legislatures of Ontario and Quebec, except with respect to such as existed under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland.

AND WHEREAS by Section 92 of the said Act, it was provided that in each Province of the Dominion of Canada the legislature may exclusively make laws in relation to matters coming within the classes of subjects thereinafter mentioned.

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. In matters within the jurisdiction of the Legislature of the Province, all powers, authorities and functions which, in respect of like matters, were vested in or exercisable by the Governors or Lieutenant-Governors of the several Provinces, now forming part of the Dominion of Canada or any of the said Provinces, under commissions, instructions or otherwise at or before the passing of the said Act are, and shall be (so far as this Legislature has power thus to enact) vested in and exercisable by the Lieutenant-Governor or Administrator for the time being of this Province, in the name of Her Majesty or otherwise as the case may require; subject always to the Royal Prerogative as heretofore.

2. The preceding Section shall be deemed to include the power of commuting and remitting sentences for offences against the laws of this Province, or offences over which the legislative authority of the Province extends.

3. Nothing in this Act contained shall be construed to imply that the Lieutenant-Governor or Administrator has not had heretofore the powers, authorities and functions in the preceding two Sections mentioned.

THE EXECUTIVE POWER CASE.

ARGUMENT.

MR. BLAKE.—My Lords, the Act here complained of is, and can be, complained of only on the ground that it is, in whole or in part, beyond the powers of the legislature which passed it. I quite agree that, if my learned friends are able to demonstrate that it is in some one particular beyond those powers, the law gives your Lordships power to decide that the legislation is, so far, bad. I agree further, that if it is beyond those powers in some particular, not separable from the other parts of the Act, why, of course, that vice being, *ex hypothesi*, communicated to and permeating the whole legislation, the whole is bad. But, after all, it is only on the ground that the legislation is, in whole or in part, outside of the legislative power, that your Lordships can intervene. The law therefore may be wise or foolish; it may be, in a sense, prejudicial or beneficial to the Dominion or to the Provincial interests; it may be vague and uncertain; it may sin against those canons for the framing of Provincial laws which my learned friend has indicated in the course of his argument, with the suggestion that they should perhaps be even enforced by the Courts, namely, that such laws must be very precise, must be very clearly and distinctly within, else they are to be held to be beyond the Provincial powers; it may sin against such canons as these; but still, with these suggestions, I submit, the Court has no concern. The question I repeat is, whether in some one or more particulars Counsel are able to convince the Court that the law is outside the power of the Province; and, in answering that question—so far from acting in the spirit in which my learned friend invited the Court to act, of invoking alleged vagueness, alleged uncertainty, alleged comprehensiveness, alleged difficulties in ascertaining how much is embraced in or excluded from the operation of the statue; and on such grounds declaring it to be outside the power—it is clear that the Court should take opposite methods of approaching the subject; that, if there be two feasible constructions, that one should be adopted, which is consistent with the validity of the law; and that all presumptions and intendments, which can be fairly and reasonably made in favor of the legislation, should be so made. These rules have been laid down repeatedly. I refer your Lordships to the very early case of *Severn v. The Queen*, 1 Cart., page 414, in which Strong J. indicates the general principle:—

> It is, I consider, our duty to make every possible presumption in favor of such Legislative Acts, and to endeavor to discover a construction of the British North America Act which would enable us to attribute an impeached statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it; and in doing this, we are to bear in mind "that it does not belong to Courts of Justice to interpolate constitutional restrictions: their duty being to apply the law, not to make it." It must, therefore, before we can determine that the Legislature of the Province of Ontario had exceeded their powers in passing this Act, be conclusively shown that it cannot be classed under any of the subjects of legislation enumerated in section 92 of the British North America Act, which is to be read as an exception to the preceding section.

And, in the late case which has been more than once adverted to in this argument, *The Queen vs. Wason*, your Lordship, Mr. Justice Burton said:—

> Perhaps there is no rule more clearly and universally acknowledged in regard to the judicial construction to be placed upon statutes when the Courts are called upon to decide whether the subject matter dealt with is within the competence of the particular Legislature which passed them, than this:—that in cases of doubt, every possible presumption and intendment will be made in favor of the constitutionality of the Act in question,

and so on.

Now, looking at this law from that, which I have just shown is the proper point of view, let us inquire what the Legislature does purport to do. The preamble gives accurately the effect of the 65th section of the British North America Act. After that accurate recital, the first clause purports, by a general reference, to vest in the Lieutenant-Governor certain powers, authorities, and functions. The third clause repudiates any inference that the Lieutenant-Governor was not theretofore possessed of these functions. Therefore the Act is, perhaps, by the combined operation of the first and third clauses, turned into a declaratory law, so far as declaration may be useful; as well as an enacting law, so far as enactment may be required; the combined operation of those two clauses producing this result.

I reserve the second clause for separate consideration; and, taking the first, and inquiring only what extent of power is assumed, I propose to show your Lordships that by express terms nothing is attempted which is beyond the power of the Legislature; of which proposition there are no less than four distinct indications contained in the statute.

First, the preamble, as I have stated, accurately recites the sixty-fifth section of the British North America Act; and thus shows that the powers which are referred to are such as existed at the Union, and in so far as the same were capable of being exercised after the Union, in relation to the Governments of Ontario and Quebec respectively. That is the description which is incorporated, for the whole purposes of the statute, of the class or kind of powers touched; and it throws, as I contend, a clear light on, and gives a distinct interpretation to any general words in the enacting clauses; showing, as the Court is entitled to conclude, that the powers spoken of therein are powers of the character referred to in the preamble, namely, "those capable of being exercised after the Union in rela-

tion to the Government of Ontario." That is the first indication.

Secondly:—The first clause begins by this limitation of its subjects:—"In matters within the jurisdiction of the Legislature of the Province." That alone would be enough; for, to any matter which is not within the jurisdiction of the Legislature of the Province, the clause, by its terms, has no application whatever. So, having first found the range of purpose by reference to the preamble, you get the second limitation, "In matters within the jurisdiction of the Legislature of the Province."

But, Thirdly, to make assurance trebly sure, a further limitation provides that the prescribed powers shall be only "so far as this Legislature has power thus to enact."

What is the effect of that? It is, clearly, that if any one of the powers which are mentioned in any one of those Commissions, Instructions, or other documents, which are dealt with by general reference, would be beyond the competence of the Legislature to vest in the Lieutenant-Governor, that one is, in terms, excluded.

Suppose you find a particular Commission which contains twenty powers given to a Lieutenant-Governor; and, of these, nineteen are not such as the Legislature could vest in the Lieutenant-Governor, not such "as had relation to the Government of the Province of Ontario," not such as "the Legislature had power to enact," the nineteen are not attempted to be embraced; they are in terms excluded; there is no effort to introduce them; there is a successful effort to omit them; and it is the single remaining power, that which alone is within the authority of the Legislature, which alone is introduced. Except for the suggestion made by the Appellant that this bit of legislation cannot be accomplished, save in connection with some particular act of legislation of another description under Section 92 of the B. N. A. Act, it is not denied that there are powers which may be vested in the Lieutenant-Governor, powers necessary to carry out, or useful to carry out, or proper in the opinion of the Legislature to carry out its legislation. It is indeed suggested, and with that I shall deal later, that the Legislature cannot grant these powers, irrespective of or unconnected with some contemporaneous act of legislation of its own, dealing with the topic; that it is only as incident to such dealing that it can grant these powers. Putting that by for one moment; assuming that there is, as I think there is, no force whatever in that argument; it is conceded, that there may be an Act of the Legislature handing over to the Executive of the Province, creating in the Executive of the Province, an authority to do some things which are necessary or proper in order to carry out some legislation which it is in the power of the Legislature to enact. So that there may be—and that is quite enough for my purpose—there may be powers which the Legislature may vest in the Lieutenant-Governor. It is not at all for my learned friends to say, as they do say, that they are not to be put to the inconvenience of ransacking the Commissions, Instructions, and various documents to which general reference is made, in order to ascertain what powers are given to the Lieutenant-Governor. If it were the function of this Court to decide whether the legislation was neat, whether it was in the most convenient shape, whether it was precise, whether it was capable of being improved in form, I could understand my learned friends arguing, and arguing with very considerable force, in favor of a schedule, in favor of a list of functions, authorities, and powers with which the Legislature proposed to invest the Lieutenant-Governor. But we are not here to criticize the legislation, and the Court is not here to dispose of the question, on grounds of convenience, neatness, form, or precision. It is enough to say that whatever the Legislature can grant of executive power to the Lieutenant-Governor under the law and constitution, it does grant; and that it grants no more. It is for my learned friends, who allege that this clause is *ultra vires*, to show affirmatively that there is no power which the Legislature can constitutionally grant to the Lieutenant-Governor. It may be that if my learned friends had proceeded to demonstrate by an exhaustive process that there was nothing in any Commission, in any Instruction, in any document, in any form, under any state of circumstances, nothing whatever which could be vested in the Lieutenant-Governor, there would be some force in their argument that the mere saving clause "so far as the Legislature has power to enact the same" ought not to protect the statute from a declaration of the Court that it is a statute beyond the power. But, whether it be convenient or inconvenient so to guard itself, whenever the Legislature has chosen so to guard itself, it is for those who attack the statute as beyond the power to show that there is nothing at all in any of the various subjects which are incorporated in the clause, within the power, in order that they may be able to obtain a declaration from the Court that the clause is beyond the power.

Now, there is yet another limitation. I said there were four. The Fourth is that the legislation is "subject always to the Royal prerogative as heretofore" So that if there be any portion of the Royal prerogative which is, at the moment, lawfully in the hands of Her Majesty individually, or in Her hands on the advice of the Imperial Privy Council, or in the hands of the Governor-General as Her representative, individually, or on the advice of the Queen's Privy Council for Canada, that portion of the prerogative is left intact; and capable of continued exercise. There is no assumption of excluding the Royal prerogative. There is an assumption of giving powers leaving the Royal prerogative intact; as has been done in *pari materia*; as I shall show your Lordships when I come to deal with the statutes on the subject of pardon, which provide a double or alternative method of action; which allow of a local dealing with pardons, and which allow also of a dealing with pardons by the Imperial authorities, for the same offence. The result then is that the Royal prerogative is saved; and, being saved, yet some power is assumed to be given to the Lieutenant-Governor.

Now, an interference to exclude the Royal prerogative, an Act not containing that express saving, and which, not containing the saving, had, expressly or impliedly, excluded the Royal prerogative, might or might not have been successful. There is quite enough to treat here without entering into the discussion of that question; needless here, because it is not here attempted to exclude the Royal prerogative. If the Royal prerogative is to any extent affected, it is affected only by lodging some power to pardon in the Lieutenant-Governor; leaving any right there may be in the Queen or in the Queen's representative, under the constitution, untouched. These, also, may, notwithstanding any words in the Act, pardon if they please. It might be sup-

posed that this would be a very inconvenient plan; but there was a reason, as will appear later, a very obvious reason, why, when the power of pardon was dealt with by legislation here, some power should still be reserved and maintained in the hands of the Imperial authorities. But, I ask your Lordships to mark that there is no need here for doing what has been frequently done, implying a saving of the prerogative; because the saving is express.

Upon the general question of the effect of limited legislation, I desire to refer to some observations in the case of *Monkhouse v. The Grand Trunk Railway*. I take all my citations, in the numerous cases in which that is possible, from Cartwright. I quote from 3rd Cart., at page 294; the language of Patterson, J. :—

> The Statute in question, 44 Vic., ch. 22, has been spoken of as *ultra vires* of the Ontario Legislature. Whether it is so or not depends upon the interpretation which is put upon it. It professes, in sec. 2, to apply its provisions to every railway and railway company in respect of which "the Legislature of Ontario has authority to enact such provisions respectively."
>
> Reading this literally, no question of *vires* can arise. Neither can such a question be reasonably suggested if the enactment is understood to relate to those railways only to which the legislative authority of the Province is restricted by the exception contained in the tenth article of section 92 of the B. N. A. Act, coupled with the 29th article of sec. 91. But, if it can be taken to contemplate all railways in the Province, it may well be asked it jurisdiction to pass the Act existed. I do not see that the Act can be properly read except in one of two ways; either as intended to govern all railways in the Province, or as confined to those which are not covered by the exception in article 10. To attempt to construe it more literally, would, in my judgment, be to treat it as so uncertain as to destroy its value as a piece of practical legislation. Violation of its mandates or prohibitions would be punishable by indictment; and it cannot be assumed that the Legislature intended to throw upon any company the task and the risk of deciding whether it was, or was not, aimed at as one with respect to which there was authority to enact all or any one of the provisions of the Act. There must be some criterion capable of being precisely stated, which the Legislature must be supposed to have had in view. The language employed in the second section shows that all railways were not aimed at, while the limited class is not indicated in any other way than by the general reference to the legislative jurisdiction. I think the only way to give a practical construction to this is to understand it as referring to the terms of the B. N. A. Act, and thus as intended to affect only those railways over which the Legislature, under the tenth article of section 92, had exclusive jurisdiction, because situated wholly within the Province, and not declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces.

So your Lordships see the learned Judge thinks that a provision, touching every railway company in respect of which the Legislature has authority to enact such provision, embraces a definition limiting the provision to one particular class of railway companies. He gives to the language of a clause, drawn almost word for word as this clause is drawn, that limited interpretation which was needed to make the clause operative and effective.

Then Mr. Justice Burton at the same page, 294, indicates that the Ontario Act

> was intended to apply to those railways only which, under sub-section 10 of section 92 are placed under their jurisdiction, namely: those lying wholly within the Province, and not declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces. That being so, the point which was mainly argued before us does not necessarily arise for adjudication, and I abstain from offering any opinion upon it.

Sprague, C.J., at page 291 says :—

> The short question is, whether the Act of the Legislature of Canada, under which this action is brought, applies to the Grand Trunk Railway Company. The question assumes this shape because the Act itself, in terms, applies only "to every railway and railway company in respect of which the Legislature of Ontario has authority to enact such provisions," and the inquiry is, whether the Provincial Legislature has authority to apply the provisions of the Act under which the action is brought to the defendants. The solution of the question lies in the interpretation proper to be put upon sections 91 and 92 of the B.N.A. Act.

The Court at once proceed to enquire whether the Legislature had authority to apply that Act to the Grand Trunk. If it had not, the Act does not apply. Why? Because the Legislature has said, we apply this only to the railway companies in respect to which we have authority to enact.

A strong indication of the effect of a saving of the prerogative is to be found in the construction which has been finally put upon the 71st section of the Supreme and Exchequer Courts Act as originally passed. Your Lordships will remember that section :—

> The judgment of the Supreme Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard; saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal prerogative.

For some time considerable doubt was expressed whether under this clause, taken as a whole, the appeal to the Privy Council was not barred; and the fate of the Act was for a while doubtful. The ultimate decision of the Imperial legal and executive authorities was, in accordance with the views pressed upon their attention, that the saving of the prerogative was full, entire, and effectual; that, while the clause interfered with any statutory provision which might have been made, it left Her Majesty a full discretionary right to direct or to allow any appeal to herself to be heard, as before.

Burton, J :—The members of the Judicial Committee said it was rather too late in the day to raise that question. It had granted a number of appeals in the meantime, therefore they said it is not necessary to pronounce any opinion upon that, because after this lapse of time we certainly would not give effect to this objection.

Counsel—I happen, personally, to know, having been engaged officially in that discussion, that the opinion of a very eminent Lord Chancellor, Lord Cairns, expressed and acted on at an early day, was that, under the true construction of the Act, the right of allowing appeals remained. Indeed upon that question—I suppose at this time of day there is no harm in saying so—the fate of the Act appeared to depend. That was the view which, after discussion, was adopted; the view under which the objection which had been supposed to exist to the Act was withdrawn; and of course that construction must now at any rate be taken to be the settled law.

I submit that it is perfectly clear that the first clause, speaking as it does only in general terms, and subject to those four limitary provisions to which I have referred, is *intra vires*. It is needless to go into an enquiry—my learned friend has not attempted to enter into an enquiry; he says it is an enquiry into which he cannot enter, because he does not know what these powers are—but it is needless to go into such an enquiry; as needless as it would be tedious. It is needless; because the powers which are granted are only such as the Legislature has authority to grant, and only in

matters within the jurisdiction of the Legislature, and only in matters relating to the government of the Province, and only subject to the exercise of the Royal prerogative, as heretofore; and, all this being so, the Court will not attempt to go beyond the necessities of the case; will not attempt to frame a schedule, or to draw a line; but will say that it cannot pronounce the first section of this law to be *ultra vires*.

If at any time a Lieutenant-Governor of the Province assumes to exercise under this section a power, beyond the legislative jurisdiction of the Province to confer, he cannot even set up this Act. He can, under this Act, justify only such powers as are within that jurisdiction. No mischief, therefore, can result; no excess of power can be even *prima facie* warranted; and thus no conclusion can be reached save that the judgment below is in this respect correct.

HAGARTY, C. J.—A very excellent argument in favor of its not being necessary for us to consider that firs, clause.

COUNSEL—Certainly my Lord. That is my first position.

HAGARTY, C. J.—I asked Mr. Robinson, where the subject matter was clearly without their jurisdiction, yet if they say "if we have power to enact we do enact" so and so, whether that would make the Act bad or good. My view ran in favor of the Court not having to enter into what I would call a mere abstract discussion, following what you have said.

COUNSEL—The question can arise only in the concrete; and the instant that harm is attempted to be done under the Act the attempt fails; because the power which the Lieutenant-Governor assumes to exercise is either given to him by the Act, or it is not. It is not even assumed to be given to him, unless the Legislature had power to give it to him. They have not assumed to give anything they had not power to give; therefore no harm can be done under colour of the Act. If he tries to do a thing which the Legislature could not assume to give him power to do, the Act does not give even a *prima facie* warrant for his attempt.

HAGARTY, C. J.—I agree in that, with all my heart; I dread these sort of discussions.

COUNSEL—Then, my Lords, I proceed to treat the second clause, primarily, after the same fashion, and with the same purpose, for which I have been treating the first clause; namely, just to find out how far it goes.

How far does this second clause go? It is clear that the same four limitations to which I alluded a moment ago apply to this clause; that all the limitary provisions which are applicable to the first apply also to the second clause. What is done is to include in the first clause the power mentioned in the second clause. What does it say?

> The preceding section shall be deemed to include the power of commuting and remitting sentences for offences against the laws of this Province, or offences over which the legislative authority of the Province extends.

Therefore, you read the clause in. You are to include it. You include it just as if it had been expressed, by adding after that general statement, "all powers, authorities, and functions, "including the power," and so forth. Then, it is only, (1), as expounded by the preamble, (2), as limited to matters within the Provincial jurisdiction, (3), so far as the Legislature has power to enact, and (4), subject to the Royal prerogative as heretofore, that the power of commuting and remitting sentences for offences against the laws of this Province, or offences over which the legislative authority of the Province extends, is given.

OSLER, J.—You do not read that second clause then as a concrete instance of something that the first clause is intended to apply to absolutely?

COUNSEL—Hardly, my Lord. I submit that is not the better construction.

> The preceding section shall be deemed to include the power of commuting and remmitting sentences for offences against the laws of this Province or offences over which the legislative authority of the Province extends.

You cannot do more than include it. It cannot be more effective than its words. If you do include it, it applies only, as I contend, to matters within the jurisdiction of the Province.

OSLER, J.—Is not the second clause a declaration that that particular thing is within the jurisdiction?

COUNSEL—I admit, my Lord, that it may fairly be held to be a declaration that there is some one instance, at least, of commutation or remission of sentence for offences which is within the jurisdiction

HAGARTY, C. J.—Oh, yes.

COUNSEL—I think, if your Lordships should hold that there is no one thing in the way of commutation, or remission, which is within the Provincial jurisdiction—this statute is an affirmation of the contrary view, namely, that there is some one such thing within that jurisdiction; and, if you find that there is nothing on which the law can operate, whether it comes within the technical terms of *ultra vires* or not, certainly your Lordships are face to face with a practical question; and I think you might properly and usefully make the appropriate declaration. My position is not exactly that to which your Lordship Mr. Justice Osler has pointed; it is rather that the Act limits the provision as to the power of commuting and remitting sentences to those classes of cases, if any such there be, which are within the jurisdiction of the Province of Ontario, and operates only to the extent, however limited, to which the Legislature has power to enact.

HAGARTY, C. J.—You meet his objection, that the words are wide.

COUNSEL—Yes. My learned friend I think admitted, or almost admitted that the Act would fairly operate on the remission of a fine. If you find one subject only upon which it can operate, it operates upon that subject, and upon nothing more; and therefore, it does not exceed the powers of the Legislature.

MR. ROBINSON—I do not know that I admitted that it included the remission of fines.

COUNSEL—My learned friend is not prone to make admissions. Then take it that my learned friend did not, as I supposed, admit it. He certainly made a distinction on that head; and I say that if the distinction which he made does exist, and to the extent which I thought he made it, namely, that one case is within and the rest are without the power, it is enough for my purpose to show that one is within, and the statute then applies to that only; and even attempts no more. But, be it remarked that if there is nothing within the clause, there is still no attempt to go beyond the powers of the Legislature; and the extreme effect of this whole legislation, even as to the second clause, comes to be that there may be nothing upon which, according to its terms, the clause can operate.

OSLER, J.—I was going to ask what the statute did.

COUNSEL—If your Lordships find, affirmatively, that there is nothing whatever on which this clause can operate, such a finding will, of course, practically amount to this, that there has been an attempt, in some sort, to go beyond the legislative power. But the practical result of such a declaration will be that the clause does in terms nothing whatever, because the Legislature has no power whatever.

But, if we find anything whatever upon which the clause can operate, if there be something within, and also something without, the power, then the clause operates, according to its terms, only upon the former; it operates, according to its terms, on those things only which are within the legislative authority; and, I say confidently that there is much on which it does operate.

OSLER, J.—From the point of view you are now arguing, what is the object of the second section? Would not the first one be sufficient?

COUNSEL—I really do not know the precise object. Unquestionably, I suppose the first would be sufficient. I have not sufficiently studied all the Commissions, and so forth, to see whether this power was in them, or in which of them. I cannot answer that question positively; but I suppose the object was distinctly to indicate that the Legislature conceived that in some one or more classes of cases they had power to give the Lieutenant-Governor authority to commute or remit sentences; and that to the extent to which they had such power they wanted it to be expressly understood that they were exercising it. That is, as I interpret it, the meaning and object of the second section. There can be no question that it was the view of the Legislature that there was some instance, by them left undefined, in which they could give that power to the Lieutenant-Governor. Whenever they could, to the extent to which they could, they gave it.

Now, it is suggested by my learned friend that this second clause may operate on matters with which the Provinces might have dealt, or perhaps had dealt, but which have become "crimes" under the B. N. A. Act by Dominion legislation.

I point out that the limitations to which I have referred completely exclude any danger that the power can be exercised in respect of a crime made such by Dominion legislation. My learned friend read the second section as if it was to be read by itself; and argued that it gave a power of "commuting and remitting sentences for offences against the laws of this Province, or offences over which the legislative authority of the Province extends," without any light to be derived from the former section. I say no; I say that the light which we derive from the former section shows that it is only in matters within the authority of the Legislature of the Province, and only so far as the Legislature has power to enact that the power is given; and, when my learned friend asserts that it is given in such sort that a man sentenced to imprisonment or fine, in respect of a crime under a Dominion Act, could be pardoned; in such sort that he could be relieved in any shape or sense from the effect of that sentence; I say no. I say it is perfectly clear that the limitatory provisions to which I have referred, apart from the language of the second section itself, prevent the possibility of any such conclusion; because the matter would not be within the jurisdiction of the Legislature of the Province, it would not be a matter as to which the Legislature had power to enact. My learned friend himself argues that it is not within the power; he argues that it is beyond the power of the Legislature. I dare say it is. I am not concerned now to differ with him. I say only that, if it is, as it probably is, beyond the power, than this second clause, having regard to its reference to the first, does not touch it; irrespective altogether of its own language "offences against the laws of the Province, or offences over which the legislative authority of the Province extends."

Even apart altogether from those imported limitary provisions by which the language is hedged around, I contend that the language of the clause itself, upon its fair and reasonable interpretation, and still more upon such favorable interpretation and intendment as the Court is bound to give to it here, is not so wide as my learned friend suggests. It deals, not with crimes, but with sentences; it deals with the power of commuting and remitting a sentence for an offence against the law of the Province. It deals, therefore, with the power, in matters within the jurisdiction of the Legislature of the Province and so far as the Legislature has power to enact, of commuting and remitting a sentence for an offence against the law of the Province. The Lieutenant-Governor may commute the sentence, he may remit the sentence. Now, have the Legislature the power to authorize the Lieutenant-Governor to commute or remit a sentence awarded, under a Dominion Act, for an act which is a crime under the law of Canada, and is also an offence against the law of the Province? It is not necessary for your Lordships to answer that question; because if the Legislature have that power they have given it, but if they have not that power they have not given it; they have not even professed to give it. They have given power only in matters within the legislative jurisdiction of the Province. Therefore, my learned friend conjures up difficulties; he propounds to your Lordships a construction of this clause far wider than its reasonable meaning, far wider than its fair interpretation, even standing by itself; and he rejects the limitations which apply to it as contained in the first clause; all in order that he may convince your Lordships that it contains objectionable and *ultra vires* provisions; and he asks your Lordships, upon such a theory, so to declare.

I repeat, even *ad nauseam*, and with reference to the second what I have said with reference to the first clause, that if it can be found that there is any one class of sentences which the Legislature has the power to authorize the Lieutenant-Governor to commute or remit, that is enough; the law is good; there is something on which it does operate; and it professes to operate no further and upon no other sentences, than those to which the legislative jurisdiction of the Province extends, and in respect to which the Legislature has power to enact.

I submit it to be of the first importance that in disposing of a question of such magnitude as this, whether a Legislature has transcended its powers, due and full effect should be given to the cautionary language and the limiting words with which that Legislature surrounds its actions; and that, as the Court would in the concrete, in the particular case, hold that the Act had not the effect of giving the power which was assumed to be exercised by the Lieutenant-Governor, so here in this preliminary

and general proceeding in which, on an abstract case, the Court is asked to give an interpretation to the Act, it will adopt the same wholesome and saving interpretation, that the Act professes to do no more than that which the enacting Legislature had power to do.

Then, my learned friend says the clause deals with crimes, Dominion matters; and he conjures up a number of difficulties on a supposed state of circumstances hardly conceivable as practically existing.

OSLER, J.—Just make your last statement plain to my mind. "Laws of this Province" in that section mean, according to your argument, "laws which this Province has power to pass, has passed, or may pass?"

COUNSEL—Or may pass; that is my view of it, my Lord, and I throw upon that the further light given by the phrase "in matters within the jurisdiction of the Legislature of this Province." I add that. But, I say that standing alone, if I had not that light, "the laws of this Province," when spoken of by the Legislature of this Province, mean "the laws which have been or may be passed by the Legislature of the Province." I refer to the preamble, also, as throwing some light upon that:—

> And whereas by section 92 of the said Act, it was provided that in each Province of the Dominion of Canada the Legislature *may exclusively make laws* in relation to matters coming within the classes of subjects thereinafter mentioned.

That is recited in the preamble; and then the laws of the Province are spoken of in the clauses—meaning therefore, laws which the Legislature may make, has made, or may thereafter make, as referred to in the second part of the preamble.

Then, as to the "laws and offences over which the legislative authority of the Province extends." The meaning of that is, that there were prior to Confederation, laws in force in the Province whether by the common law, by Imperial legislation introduced into this country by ourselves, by the former Provincial authorities, or by the law of the old Province of Canada, which laws fell within that body of law, that mass of subjects, which became after Confederation Provincial—for instance, offences against municipal by-laws. As to all that body of prior legislation which, upon the passing of the B. N. A. Act, fell within the Provincial scope; which the Province could the next day, if it pleased, have repealed; which it could amend at its pleasure—as to all that body of laws, if by any portion of it there is created an offence, that is an offence over which the legislative authority of the Province extends. So that, if it be found that any particular sentence is a sentence due, not even to post-Confederation Provincial legislation, but to ante-Confederation legislation enacted on a matter and after a fashion in which the Province after Confederation might itself have dealt at its pleasure, the power, as is reasonable, shall extend to that case, as well as to those in which the Province itself, has alter Confederation, passed its own enactments.

Now, as I was about to say, it is by what I must call a very fantastic operation of the mind, that we are asked to adopt the conclusion that great difficulty and inconvenience can arise from this clause with reference to Dominion matters. What my learned friend suggests is that the Dominion Legislature may make that a crime which the Provincial Legislature has made or may thereafter make an offence. I think a very serious question might arise as to whether in any matter which the Dominion Legislature—acting whether rightly or wrongly, in the sense of propriety, but acting within its constitutional power—had made a crime, the Provincial Legislature could thereafter interfere by making it an offence. It is perhaps possible that, if by such valid exercise of the Parliamentary power of Canada the matter had been converted into a crime, there might be abstracted from the Provincial jurisdiction—not the matter, indeed, but the power of making it a Provincial offence. It is a difficult question, on which one would wish to reserve one's opinion; because it is needful to see to what extent this would carry the authority of the Dominion parliament; for, as I observed, in *Queen vs. Wason*, it is clear that a too liberal interpretation of that authority as to Provincial crimes would make it like Aaron's rod; and it might swallow up the other powers. But, are we to agree, from such a possibility as is set up, that the two Legislatures would go to work each making different sets of crimes and offences, out of the same act of an individual, and for each such crime or offence providing different punishments, and thus of course providing that a man might be exposed to that which is contrary to a fundamental rule of British jurisprudence; that for the same thing no man shall be put more than once in peril? Are we to agree that the Lieutenant-Governor may commute the Provincial sentence, and that the commutation of that sentence for that offence may have a certain effect upon the Dominion sentence for the Dominion offence? No. Even if we make all these far-fetched assumptions, all that is done by the Lieutenant-Governor is to commute or remit the sentence which was passed under the Provincial authority for the Provincial offence; and he has not commuted or remitted—he cannot apparently commute or remit the Dominion sentence for the other offence or crime, the other and separate offence or crime, legally speaking, which was accomplished indeed by the same transaction, but which was made a crime by the Dominion while it was made an offence by the Province. Therefore, I think there is nothing whatever in that. The dealing is with the Provincial sentence, under the Provincial law, for the act, which is made a Provincial offence; and as I say it includes acts which are made offences by Provincial law, or which have been made offences by ante-Confederation laws, in matters within the range of subjects on which the Provinces had, after Confederation, exclusive Provincial jurisdiction, which they may later on at their option exercise; but it does not include the sentence for the crime under the Canadian law.

My learned friend read an article in a periodical with reference to the effect of that very early statute of the Dominion, which made misdemeanors out of such matters, prohibited by Provincial laws, as were not made offences otherwise. Well, if one were discussing the policy or propriety, or even the constitutionality of that legislation, there would be very much to be said against its policy and propriety and even its constitutionality. It may be reasonably urged that if the Provincial Legislature chooses to prohibit an act, that Legislature has under the constitution full and ample power of itself enforcing its prohibition by its own legislation. It has power, by imprisonment up to the term of life, it has power by fine, unlimited, to enforce its

prohibitions. And if a Provincial Legislature has, in any particular instance, simply prohibited an act, without providing a penalty for the breach of its prohibition, any difficulty in enforcing its law is due only to its having omitted to provide a penalty, and is to be remedied only by its own action. I should say therefore, that a statesmanlike consideration of the division of the powers of the constitution would indicate that the Dominion legislation to which my learned friend has referred is, not only needless, but improper and unconstitutional; that the Provincial authorities ought to be left to enforce their own laws by their own penalties; and that, if they choose to leave a law unenforced by a penalty, it is their own sole concern. But the question is of no immediate consequence; because it is only the sentence under the Provincial law which is touched by this Act. If more there be, and if your Lordships hold that more would be beyond the jurisdiction of the Legislature, that more is not included.

Now, as I have said, some things are, I think, clearly within the Provincial power. For instances, penalties payable under its laws to an informer, penalties payable to a municipality, penalties payable to private individuals, fines payable to the use of the Province. My learned friend said he would not admit it; but I ask your Lordships whether it is arguable that the Legislature, which has unquestionable power to enact that a man shall be liable to pay a penalty to an individual, or to a municipality, or to an informer, or a fine to the Treasurer for the uses of the Province, has not power to remit that penalty, to waive that fine; has not power to undo its act; has not power to say that the penalty or fine imposed under its authority shall not, under certain circumstances, be eligible? It seems to me to be impossible to contend, seriously, that such a power does not reside in the Legislature. And indeed, in other parts of his argument, my learned friend, speaking in general terms acknowledged that there were several ways, at any rate more than one way in which the Legislature might have done this very thing. But he said that this was not the right way! If I am to draw a meaning from that observation, the only meaning I can draw is, that the Legislature have the power to provide the machinery in connection with the imposition of any particular fine or penalty; that, when enacting the law providing for the imposition of the fine, or penalty, they have the power to provide for its remission; but they cannot exercise that power generally, or as an isolated and detached piece of legislation.

Now, first of all, have they the power *quo cunque modo*? The Legislature, for example, enacts that a particular act shall be prohibited, and that the sentence for the non-observance of that law shall be a fine payable to the Treasurer of the Province for the public uses of the Province, or to the Crown for the public uses of the Province. That is within its power, surely. If that be within its power, can it not "do what its likes with its own"; with the money which it orders to be paid to the public uses of the Province, to the Treasurer of the Province, or to the Crown for the Province; with its own money? Can it not give up what it has? Can it not yield that which itself has exercised a legislative right to take? Can it not provide a machinery for the yielding of it, for the giving of it back, for the remitting of it? Cannot the Legislature which directed or authorized the imposition of the fine, assuming, if it pleases (however improperly, and contrary to sound principles as to the division of powers) assuming the judicial as well as the legislative power, impose the fine itself? Can it not repeal the law which imposed the fine? Can it not by Act of the Legislature relieve the party from the fine? Can it not by Act give up a Crown debt? Can it not by Act interfere with and abrogate the right of the informer, or other private person interested? Surely, yes. Well, under the authorities, nothing is clearer than this, that what the Legislature can do, it can delegate the power to do; and that it can provide for the doing of it in whatever way it deems most convenient and effective.

That question was of course, as I will show later, the subject of discussion and of controversy; but it is now settled; and the principle is clear, that what the Legislature can do legislatively it can do by delegation; nor could anything make our constitution more lame and defective than to conclude that matters, which confessedly might be infinitely better disposed of by delegation to a single executive or judicial authority, must yet be disposed of by the direct action of the Legislature itself, because unhappily its power is not wide enough to enable it to provide for their disposition by delegation.

HAGARTY, C. J.—Dropping the word "pardon"; suppose the legislation was that in all cases of penalties directed to be paid to the Provincial Treasurer, any person aggrieved might present a petition to the Lieutenant-Governor, and that the case might be investigated, and the penalty remitted or refunded. Practically, that would be doing the same thing.

COUNSEL—It is the same thing.

HAGARTY, C. J.—It would avoid the obnoxious word "pardon," and it would deal effectually with the thing.

COUNSEL—But the obnoxious word "pardon" does not occur.

HAGARTY, C. J.—But, I mean we have heard a good deal about that. It would be arriving at the same result by prescribing the way to do it; that any person directed to pay a fine might petition, and the matter might be brought before an appointed man for investigation, and the amount, in the judgment of say the Lieutenant-Governor, be remitted. It is doing just the same thing of course.

COUNSEL—It is the same thing.

MACLENNAN, J.—The power of pardon could be exercised by the Legislature?

COUNSEL—It would be in a sense an Act of grace. There are certain things which even Parliament cannot do, for instance Parliament cannot dissolve itself.

MACLENNAN, J.—I was speaking of the Legislature as distinguished from Parliament. Could the Canadian Parliament remit a Provincial penalty?

COUNSEL—Unquestionably, no.

MACLENNAN, J.—Or a municipal penalty?

COUNSEL—Unquestionably, no. The only way in which the Canadian government, as a whole, by the exercise of either legislative or executive power, can affect Provincial laws is, as I understand it, (except in one or two cases in which there is concurrent legislative power), by the exercise of the power of veto or disallowance; but the law once passing beyond that power, and being efficacious,

there is an end of all power to deal with it in any way.

HAGARTY, C. J.—If Mr. Robinson is right in his argument I suppose the Governor-General could remit the punishment for the violation of some local Act?

COUNSEL—That is his position. Mr. Robinson's argument is that the power is there, and is there exclusively. That is the question in the cause. If the power is there, and is there exclusively, this second section effects nothing whatever. But, it is quite clear that by this construction the power of the local Legislature, to the extent to which its power depends upon its laws being enforced, is destroyed after the same manner in which, as I successfully pointed out to your Lordships in *The Queen v. Wason*, it would be destroyed by the suggestion that procedure was in the hands of the Dominion Legislature. If you are to say of one Legislature, supreme within its own domain, having an extensive power of enacting laws and an extensive power of enforcing those laws. that its power of making its laws effective and securing their observance, its power of seeing that its sentences are executed, is to be subject to the views of any other Legislature; then any law which is opposed to the views of that other Legislature may be rendered nugatory by the simple process of saying—

> Well, we are going to pardon everybody you have convicted. You say that a fraud upon a municipality shall be punished in such and such a way, but we think it ought not; and therefore when you have prohibited such and such a dealing by the Treasurer of a Provincial municipality under such and such a penalty, every time there is a conviction under your laws we propose to pardon your offender under ours.

Your Lordship sees the seriousness of the whole question. The seriousness of the whole question is that the real effectiveness and validity and utility of laws are, by the Constitutional Act itself, indicated to depend upon their sanctions; and if, while the Provincial Legislature is, on that theory, given power to apply sanctions to its laws, the power of remitting those sanctions is to be given to another authority, then the confessedly necessary means of enforcing the Provincial legislation may practically be withdrawn from it at the will and pleasure of that other authority. That other authority cannot indeed itself make laws upon these subjects, but it can render nugatory and abortive the laws which the Provincial Legislature alone can make. That is the serious and important question before your Lordships.

BURTON, J.—And if the Parliament could not do it, of course the Governor-General could not do it alone, which appears to indicate very clearly that the prerogative, which is so much talked of, is divisible, as the other power?

COUNSEL—Yes my Lord, that is my argument; that that prerogative is divisible; and that we find this part of it just where it ought to be in order to render the Constitution symmetrical, harmonious, or even workable.

All that I am concerned to do at this time is to show to your Lordships that there is some one thing, authority to do which the Provincial Legislature could and did under this second section confer upon the Provincial Lieutenant-Governor. If, for example, the Legislature could say, as to any fine payable to the Treasurer for the uses of the Province, that the sentence to pay that fine might be remitted by the Lieutenant-Governor, the Act is saved, and we have no concern with the questions conjured up by my learned friend. So far as these are questions of difficulty and inconvenience merely, we have nothing to say to them under any circumstances—so far as they are difficulties extending even to the question of jurisdiction, yet, if we have found something on which the Act operates, that is enough; since the very language of the Act limits its operation to that which is within its jurisdiction. For, even if my learned friend's fancied difficulties go so far as to show that any one of the matters to which he has referred would be *ultra vires*, that matter is outside the Act; and the Act is good notwithstanding.

Now, before going into the general line of argument I wish to deal with some of the more specific objections.

One objection is that the Legislature is either interpreting or amending the provisions of the B. N. A. Act, both of which are said to be legislative sins. But, your Lordships will observe that the Legislature may, and constantly does, in very many respects alter the provisions of the B. N. A. Act, as well as the provisions of law imported into the Provincial system under the operation of the B. N. A. Act. Why, the very Constitution of the Province, is, by the express terms of the B. N. A. Act, amendable, with a single exception. Therefore, the general observation that the B. N. A. Act cannot be amended by Provincial Legislation is of no force whatever; unless my learned friend couples that observation with proof that, in the particular in which he suggests that the B. N. A. Act is being amended, it is not amendable.

As to the power of interpretation. Interpretation or declaration is, I suppose, always harmless, and very often useful. If, under the pretence of interpretation, there is really a change—and we have known legislation of that description—that change is operative or not just according to the decision of the question whether the Legislature had power to make the change or no. If a Legislature, having power to change the law, chooses to declare that the meaning of the law is thus and so; then, although it may be judicially determined that that was not theretofore the meaning of the law, and that the law was, in fact changed by the declaration, still it is in fact changed by means of the declaration, always provided the Legislature had power to make the change; and thus a declaration may be an amendment, and is at any rate a decision, in matters within the legislative competence.

This law, however, does enact its provisions; also by its third section enacting that nothing in the law

> shall be construed to imply that the Lieutenant-Governor or administrator has not had heretofore the powers, authorities and functions in the preceeding two sections mentioned,

Then, my learned friend objects that this is legislation as to the office of the Lieutenant-Governor, and is excluded by the first head of section 92.

I may deal further with that later. I point out now, however, that this provision has regard, first of all, to the Constitution. It is a power to amend the Constitution, except as to the office of Lieutenant-Governor. Your Lordships see, therefore, that you must read the whole clause. By it the Legislature can amend the Constitution, can introduce a Legislative Council if they like, just as Quebec can abolish, as Manitoba has abolished, its Legislative Council. Yet the Constitution, (while amendable in various extensive ways, while

susceptible of changes making it, to suggest a violently improbable procedure, very much more despotic; greatly limiting popular powers; even providing, in lieu of a representative Legislature, a nominative body as the law-making Assembly,) cannot be so changed as to interfere with the office of Lieutenant-Governor. This means then that those elements of the Constitution which can be properly deemed to be the parts of the Constitution relating to the office of the Lieutenant-Governor are not to be changed; and that for an obvious reason, because the Lieutenant-Governor is the link between the Federal and the Provincial, aye and between the Imperial and the Provincial authority; he is the means of communication, he is the chain and conduit of Imperial as well as Federal connection; and therefore his office in the Constitution, his constitutional position as a Federal officer, is not to be affected. Within this limit the details of Executive power in all local matters must necessarily be changeable; and they may be changed. The 64th section expressly gives power of alteration. It is quite impossible to suppose that a Province which has actually the power to alter its Constitution, which has power to deal with a thousand different subjects requiring provision for separate Executive action every day, has not power to deal with those details of the management of the Executive power which are complementary to, and form proper incidents of that legislative power which it has exercised, is exercising, or may exercise. I must add that it seems an extraordinary thing that the Federal authorities should object to a method of legislation as to executive power, which is not merely consonant with the general principle of the British Constitution, under, according to, and on the theory of which principle this Act is in truth framed; but which actually tends to increase the power and aggrandize the position of the sole link between the Dominion and the Province.

Your Lordships will at once see how devoid of merit, so to speak, is an objection of this nature. If the Local Legislature is to be told, "you cannot add to the functions of the sole Provincial Officer who is appointed by the Dominion Government, of the sole Provincial Officer who is under the control of the Dominion Government, of the link between the two, of the officer whose Commission says he is to act according to the instructions of the Governor-General, who holds his office in a certain sort, in a limited sense and to some degree at the pleasure, in a certain sort, in a limited sense, and to some degree under the control of the Federal authorities," it seems to me a most extraordinary pretension, which will necessarily lead to most injurious results. To what? Why, to these, that the Local Legislature will be obliged to set up some other executive authority. When they want to pass a piece of legislation which demands executive action, which demands administration, which demands for its working individual power, the exercise of discretion or authority, they will be obliged to set up somebody else, some permanent or temporary officer of their own to carry out their wishes, to do those executive acts which the Federal power, extraordinary to say, is insisting that the Province cannot vest in the Federal Officer.

So that I ask your Lordships to consider this proposition with great jealousy. It seems to me most dangerous. I think it would be very unfortunate for the good working of the Constitution, and would be most absurd, and indeed suicidal, for those who look at it from the Dominion point of view, to cast the least doubt not merely upon the power, the abstract power, but upon the propriety of the Local Legislatures, wherever there are executive functions to be bestowed, bestowing them, just as they are here bestowed, upon the head of the Executive Government of the Province, bestowing them upon that Executive head who is the link, and the only link between them and the Dominion. In truth it might be be better argued that it would be unconstitutional to confer these powers on any other than the Lieutenant-Governor.

There are some matters in which a course has been pursued in both bodies to some extent different. Executive powers have been given from time to time to Ministers; to be exercised, of course, under responsibility, but to be exercised directly by and in the names of the Ministers; which were formerly given to the Governor. For instance, the Crown Lands were, if I rightly remember, very shortly after Confederation practically vested in the Commissioner of Crown Lands. So again with reference to extradition. Take the Imperial Legislation, and take the Dominion Legislation; certain powers as to Extradition warrants which were given by Act to the Secretary of State in England, have been given to the Minister of Justice in Canada, instead of being nominally conferred on the Governor-General. There are instances of this nature in which convenience, from time to time, does point out that you shall appoint some other functionary than the head of the Executive to do some executive act; but, speaking generally, simplicity, efficiency, and the theory of the British Constitution are all furthered by the adoption of the general rule that executive powers shall be vested in the head of the Executive; to be discharged, of course, under advice; to be discharged of course, upon the responsibility of some Minister, who is to answer for that advice to the Legislature, and ultimately to the electorate.

Therefore, to say that, if the Local Legislature thinks it prudent to legislate upon some one of the matters incontestably within its jurisdiction, after a fashion which requires for the execution of its law the exercise of certain administrative powers, upon matters with which it could, if it pleased, deal directly from session to session, but which can be more efficiently and properly performed by an individual; to say that there is the least objection to assigning those executive functions, which the Legislature properly from time to time creates, to the head of the Executive, to the Lieutenant-Governor, seems to me to be out of the question. It is not merely within their authority, but I say it is the fit and proper way in which they should exercise their authority.

Well, if that be granted, yet this is, according to my learned friend's view, legislation within the exception in the B. N. A. Act as to the office of Lieutenant-Governor. I do not think it is, in that sense, legislation as to the office of Lieutenant-Governor. Rather is it legislation expressly giving, when a new executive function is created, the authority to the head of the Executive; or indeed (if, as my learned friend at one part of his argument insisted, the head of the Executive would have that authority by implication without express legislative grant) then controlling, or limiting, or subordinating to certain parliamentary checks, the exercise of the authority. Therefore, I see no difficulty at all in the grant to the Lieutenant-

Governor of any powers which are congruous, as the Chancellor phrases it, which are germane to his office, which are fit to be exercised by the head of the Executive, and with which it is within the legislative jurisdiction of the Province to deal; notwithstanding the clause that we shall not alter or amend the Constitution as to the office of the Lieutenant-Governor. It is not really an amendment of the Constitution, a change of his office or position, an alteration of his tenure. An attempt to alter his tenure would be an attempt to affect his office within the meaning of the Constitutional Act. An attempt to abolish his office would, of course, fall within that Act. But, leaving his office untouched, either to augment his power and enlarge its sphere, by giving to him the performance of appropriate executive acts; or (if by implication such performance would vest in him as the head of the Executive) then to regulate the discharge by him of a function which the Legisture certainly can itself accomplish by legislation directed, *pro hac vice*, to each case; either course I submit is unobjectionable.

For example, suppose a Provincial law provided that the Lieutenant-Governor, which would mean of course the Lieutenant-Governor by the advice of his Ministers,could sell Provincial timber limits, up to $100,000 in value, but limited to that amount his power so to deal with timber limits; there could be no doubt that such legislation would be good. There could be no doubt that, after having given the power, the Legislature could remove it, increase it, or reduce it. They might say, "We think the Legislature ought to be consulted before timber limits in excess of $10,000 are sold, and we so limit the power," or "We think it is convenient that the Lieutenant-Governor should have an unlimited power of selling timber limits; and we vest in him that power." Of course that power would be vested in him, acting by the advice of his responsible Ministers; but, it can be given, increased, reduced, or removed, just at the will of the Legislature; and none of these are constitutional changes affecting the office of the Lieutenant-Governor.

I ask your Lordships to apply those two words "constitution" and "office," in the sentence: "Amendment of the *Constitution*"; "with reference to the *Office* of the Lieutenant-Governor," as each throwing light upon the other, and as showing that it is the Constitution of the Province,which is being dealt with by the clause; and that it is the Lieutenant-Governor's office, as part of that constitution, which is being dealt with by the exception. There is then a distinction between the office in this sense, and those strictly local powers, the creation of the Legislatnre, which may be given, taken away, increased, reduced or regulated by that Legislatnre.

Then, I refer to the judgment below as satisfactorily demonstrating that the express power which is given by the section to abolish and alter does include the power to add. In fact if one thinks of "alteration" in the various, the almost innumerable senses in which that word is used, of the transactions to express which it is employed, it would appear that it is either by addition or subtraction that, in perhaps the majority of cases, "alteration" is effected. I submit that anything which does not create a complete change (although it may involve the subtraction of some power, although it may involve the addition of some power, not being within the first sub-head of 92) is included within the power to abolish and alter. And on that head I refer to the cognate section, section 129, and to the decision of the Privy Council in *Dobie v The Temporalities Board*, 7 Cart. 364; which points out that the enactmen. then under debate is qualified by the provision that all laws in force in Canada at the time of the Union, continuing in Ontario and Quebec, with the exception of those enacted by the Parliament of Great Britain, or of the United Kingdom of Great Britain and Ireland, should be subject

to be repealed, abolished or altered by the Parliament of Canada or by the Legislature of the respective Provinces according to the authority of the Parliament or that Legislature under this Act.

Now, what does the Judicial Committee say?

The powers conferred by this section, upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of the Province of Canada are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867. In order, therefore, to ascertain how far the Provincial Legislature of Quebec had power to alter and amend the Act of 1858 incorporating the Board for the management of the Temporalities fund, it becomes necessary to revert to sections 91 and 92 of the British North America Act, which enumerate and define the various matters which are within the exclusive legislative authority of the Parliament of Canada, as well as those in relation to which the Legislatures of the respective Provinces have the exclusive right of making laws. If it could be established that,in the absence of all previons legislation on the subject, the Legislature of Quebec would have been authorized by section 92 to pass an Act in terms identical with 22 Vic., ch. 26, then it would follow that the Act of the 22nd Vic., has been validly amended by the 38th Vic., ch. 64.

There is a definition of the meaning of the words "repeal, abolish, or alter," used in the same statute, as applied to the legislative authority conferred with reference to Acts of Parliament; and certainly it gives the widest possible interpretation to those terms; it certainly includes the power of addition and subtraction; and the same interpretation must be given to the same words here.

Now, my learned friend, Mr. Robinson, suggested that it was hardly necessary to elaborate here the view which I had ventured to press upon the Court below, my general view upon the theory and scheme of the B. N. A. Act; because my learned friend was prepared to concede what he admitted had been established by a chain of decisions as to the general character of the Provincial Constitution; he acknowledged that the Provinces were much higher and much greater bodies than had been laid down according to some earlier dicta, some earlier views, some notions adhered to in certain high quarters up to a comparatively late date; and he suggested that therefore it was needless longer to pursue that subject.

I feel, however, my Lords that although my learned friend's statement relieves me from the necessity of enlarging so much as I otherwise might have done upon that phase of the question, yet it is absolutely impossible to treat, as it should be treated, the important issue before the Court without some reference to the general theory of the Act. For I may say shortly, that while the attack in earlier days was made upon the Legislative authority of the Province, upon the character, the nature, the degree, the quality of the Legislative authority, as much, or more perhaps, than upon the question whether particular matters were comprised within particularly enumerated

provisions; yet I find it impossible to dissociate from the consideration of the nature, extent and quality of the executive powers and the executive Government of the Province, all directly in question here, the consideration of its Legislative authority. And this on two grounds:—First, because in reason, as under the language of the Act, I believe the Executive and the Legislative authority to be co-extensive, commensurate, and complementary the one with the other; to be of the same kind and nature, character and degree, as we would expect to find them one in relation to the other; and Secondly, because the authorities which from time to time have elucidated the position of the Provincial Legislative power contain expressions valuable here; and are themselves, in reason and in argument, inextricably interlaced with the question of the executive authority. Therefore, when we are now called upon to deal in the most plain and direct manner with the question of the nature of the executive authority in this Province; when ideas of high prerogative are put forward; when notions of the incommunicable character of the prerogative are suggested: when it is argued that prerogative powers are not to be taken as communicated to a Province under the B. N. A. Act because of the method prescribed for the appointment of the Lieutenant-Governor, and because of the language which is used about him in the statute; then it becomes necessary to examine the whole scheme of the Act as to the Provinces; so as to reach, if we may, a conclusion which shall leave the Provinces not lame, not deformed, not reft of any part of those powers, that dignity, that position, which are as essential to full and sufficient authority in the Executive as they are to like authority in the Legislative department.

First of all, I would observe that, in dealing with the nature of the Provincial constitutions, as deduced from the Act of Parliament and expounded by the decisions, we must remember, as a fundamental proposition, that the constitutional rights of the people of this country, and the legislative and executive powers already conceded to them and existing in the Provinces, were divided, some being assigned to the Dominion, and others left to the Provinces; that if the B. N. A. Act effected anything in this relation, it was not to abstract, either by omission or otherwise, any of those powers of self-government which existed within the territorial limits to which the Act applies; but it was rather to increase than to diminish the sum total of those powers of self-government; and that, whether they were increased or left standing, what was done was to divide them, to divide the sum total, not in any wise diminished, between the central and the local organizations.

That being so, the division might have assumed any form. The division might have assumed a form which would have left the Provinces only "major municipalities," a term which my learned friend now repudiates, but which was not uncommonly applied to them in some quarters for some time after Confederation—a form which would have left them to a great extent subordinated. But the division did not in truth take that form. The scheme of division was one which gave central, and also local legislative and executive powers; each of the same quality and nature, though touching different subject matters. The nature of the legislative power as distributed has been, as I have said, the subject of repeated controversy; the nature of the executive power has been so far but slightly touched on; but it has now become the subject of serious dispute. It was questioned no doubt by the language of some of the Judges in *Lenoir v. Ritchie*, and by that of one of the Judges in *Mercer v. The Attorney-General*; it has been touched on some other occasions; but it has formed, comparatively speaking, to a very slight extent the subject of direct issue, forensic debate, or judicial decision. Still, I say, that by the decisions, dealing though they do primarily with the legislative power, most precious light is thrown upon the nature and quality of the executive power. Each part of the whole body of the Constitution does reflect light upon the other; the executive powers bear a close relation to, nay, as I contend, their extent may satisfactorily be deduced from the legislative powers. Thus, the decisions reached on the one are closely relevant to the questions raised on the other.

Then, I take note of my learned friend's concessions, that the Provinces are not municipalities, that they are not corporations, that they more nearly approach the position, as he said, of independent States; that they are at any rate governments, political entities, possessing powers practically, within their range, independent; that they are political organizations formed with constitutions, with executive functions, with legislative functions, like, though not the same as, the old Provinces; that they are in fact still, though *sub modo*, and with alterations, the old Provinces.

Now, if your Lordships would refer to the preamble of the B. N. A. Act cited by Mr. Lefroy, it reads in part thus:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick, have expressed their desire to be federally united in one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom.
>
> And whereas on the establishment of the Union by authority of Parliament it is expedient, not only that the Constitution of the Legislative authority of the Dominion be provided for, but also that the nature of the Executive Government therein be declared.

You find that it is the accomplishment of a particular description of Union which is attempted by the Act, viz. a Federal Union under the Crown, with a Constitution similar in principle to that of the United Kingdom; you find that on the establishment of this Federal Union, it is declared expedient, not only that the Constitution of the Legislative authority of the Dominion be provided for, but also that the nature of the Executive Government therein be declared. I hold, with my learned friend, that it was intended to include by the words, "the Dominion" the different political parts of the Dominion; the Dominion itself, and also the several Provinces; both as to the constitution of the legislative authority and as to the nature of the executive government. That is what is accomplished by the enacting part; and that is what is recited in the preamble, in effect, although in brief terms.

Now, the third clause unites the *Provinces* of Canada, Nova Scotia and New Brunswick into one Dominion.

The fifth clause divides them into four *Provinces*. You find, therefore, the word "Provinces" used in the same sense in this Act as to the old and as to the new. That is an indication of what the word "Province" means as to the new. The three Provinces of Canada, Nova Scotia, and New Brunswick form one Dominion, and Canada is divided

into four Provinces, using the same word; it is used in the same sense; and therefore it is the same sort of body which is being treated, and the constitution of which is being adjusted in the subsequent parts of the Act. The sixth clause divides the parts of the old Province of Canada into two separate Provinces, and I may refer, as I did below, to save time, to a portion of my argument in *St. Catharines v. The Queen*, which has been printed, for the proof that the effect of these clauses was to continue the old Provinces, not to create new ones; that in truth the language which is used had regard to the necessities of the draftsman, occasioned by the fact that it was intended to divide Upper and Lower Canada, and to make the Union out of four Provinces, while there were but three before; but, for all that, they were the old Provinces continued. And light, leading to that view, is thrown upon the Act, both by certain omissions with reference to Nova Scotia and New Brunswick—as to which it was not necessary to enact some provisions, because their bounds were not altered, and they were in every feature the old Provinces—and also by the amplifications made as to Ontario and Quebec, due to the fact that they were, so to speak resuscitated; they were old Upper and Lower Canada revived; and the immediately preceding Province of Canada thus ceased to exist in that precise form.

Now, the continuance of the old Provinces, which is, I think, demonstrated by several passages quoted in the argument to which I refer, and which was practically affirmed in some phrases used in the judgment of the Privy Council—the continued existence of the old Provinces colors other clauses also. You will find a passage in a judgment of Gwynne J., where he speaks of an executive authority to summon the Legislatures of the Provinces of Ontario and Quebec being given, but being omitted, as he supposes by accident, in the cases of Nova Scotia and New Brunswick. But I submit the contrary view; I submit that it was not omitted by accident; it was omitted as unnecessary. In Nova Scotia and New Brunswick the Lieutenant-Governor had the authority just because they were identically the old Provinces. It was not necessary to give the executive power in those cases. It existed; and continued; and therefore it was not given. It was necessary to give that executive power in the cases of Ontario and Quebec, just because of the division; and, therefore, in order to set the machinery in motion, the Lieutenant-Governors were authorized to do this thing; and I repeat that the proposition which I advance of the continuance of the old Provinces is supported by this and others of the subsequent clauses.

HAGARTY, C. J.—You do not admit the *tabula rasa* argument?

COUNSEL—No my Lord. You will find in this Act, applied to the Provinces, the words "continued" and "reserved." Certain revenues are *reserved* to the Provinces, certain powers are *continued* to them; and it is on the whole perfectly plain that if it had not been for the circumstance that Ontario and Quebec had to be divided, that old Canada had to be carved into two, the words on which the argument of *tabula rasa* rest would have been entirely unnecessary; and it is to this limited end that those words must be applied.

Now, much light is thrown upon the nature and character of the Provincial legislative and executive authority by a comparison of the language which is used in the B. N. A. Act with regard to the Provinces and with regard to the Dominion. As for example, take the third division of the Act, that preceding the ninth section. Take the heading "The executive power." There is the heading "executive power"; and the section gives a definition of the executive power in the case of Canada, "the executive Government and authority of and over Canada." Of course it is judicially decided that the heading is to be looked at as really a part of the Act itself. Finding then here the phrase "executive power," I shall ask your Lordships to say what is the character and quality of this executive power; and to look with me, when I come later on to the provinces, and find what is the description of their authority. If I find "executive power" there too, I shall ask your Lordships to conclude that the things are of the same quality; they may not be of the same extent, but they are of the same quality.

Now then, this clause is:—

> The executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen.

I think that the same observation which my learned friends have made with reference to the use of the word Canada in the preamble very probably may apply to the use of the word Canada here, namely, that this is a general statement with reference to the executive Government and authority, wide enough to apply to the Provinces as well as to the Dominion in its federal element. The executive Government and authority of and *over* Canada continues and is vested in the Queen; to be exercised as regards the federal element, the Dominion, through the Governor-General, as appears in subsequent clauses; and to be exercised as regards the Provinces in the methods which are prescribed with reference to the Provinces. That construction is conformable to the general principle of Monarchical Constitutions, and of the British Constitution as one example of that class of Constitutions; a principle which makes, as I understand, of the Regal power a unit, exercised in the name of the Sovereign, not always by that personage immediately, but in a great many instances through delegates, through appointees, through officers, who themselves may have the power of appointing deputies, which deputies even exercise, within the limits of the authority conferred upon them, portions of the Regal power. And, therefore, I apprehend that this clause may fairly be read in the way I state, and may thus give us to understand that it was intended that the authority and power of the Queen—the executive authority and power of the Queen, constitutionally granted—should remain and be exercised over the whole country in its different parts and divisions, territorial and political.

Now, we turn to the twelfth clause. That clause is also an indication that the executive power is of the same character throughout. We find by it that:—

> All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective executive Councils thereof, or in conjunction with those Councils,

or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exercisable by the Governor-General, with the advice and so on, subject to be abolished or altered.

So that, having declared that the executive power and authority continue and are vested in the Queen, having provided for a Governor-General, having provided for a Queen's Privy Council for Canada, when you look for the executive powers, authorities and functions which are to be transferred, you find that all that share or portion of the whole mass of executive powers, authorities and functions in existence under the authority of the law, which remains capable of being exercised after the Union in relation to the Government of Canada, is vested in the Governor-General. That shows that there is a division of the executive authority. The whole mass of the statutory executive authority is referred to, and it is divided. That portion of it which is capable of being exercised with relation to the Government of the Dominion is set to one side and is placed in the hands of the Governor-General; and I need hardly say to your Lordships that later on that portion which is capable of being exercised with relation to the governments of the Provinces is vested in the Lieutenant-Governors of the Provinces. So that the whole mass of executive authority is divided into two parts; one part goes to one, and the other part to the other; and the executive power and authority which goes to that other is of the same quality, of the same nature, of the same origin, of the same or even higher antiquity, because it is practically continued, as I shall show to your Lordships when I come to the clause. The Provincial executive authority has not therefore any subordinate, or inferior nature or quality; but of just the same nature as that possessed by the Queen's direct representative, acting in Her name for Canada, is the executive authority possessed by the Lieutenant-Governor of the Province.

Then, the fourteenth clause, my learned friend has rightly said, authorizes the Queen to empower the Governor-General from time to time to make any person his deputy to exercise any of the powers, authorities and functions which he deems necessary to assign to such deputy, subject to any limitations or directions expressed or given by the Queen; but the appointment of such deputy or deputies is not to affect the exercise by the Governor-General himself of any power, authority or function. So that the Act contemplates what at one stage of this argument my learned friends thought to be an almost inconceivable view, namely that there may be two persons with power to exercise the one function. This clause expressly provides that the Governor-General may appoint a deputy; and may at the same time reserve the power of himself exercising the deputed functions.

Then, we come to the next division "Legislative Power"; and that legislative power is thus given for Canada:—

> There shall be one Parliament for Canada, consisting of the Queen, an Upper House, styled the Senate, and the House of Commons.

You see the phrase adopted when it was intended to give the power of legislation; that part of the Constitution is described as "Legislative Power." I shall ask your Lordships to look at the Provincial Constitutions, and see whether a different or the same phrase is used. If the same phrase is used, I maintain it is an indication of the existence in the subsequent case of the same quality of legislative power, to be exercised in the same way, and with the same degree of latitude as to methods and means and facilities for carrying out such legislative powers as in the prior case, subject of course, to any expressed restrictions.

Then the fifth division of the Act is headed "Provincial Constitutions." So that we find here "Constitutions," the same phrase which is used in the preamble with reference to the constitution of the United Kingdom, and to the Constitution of the legislative authority of the Dominion of Canada. It is not, therefore, the incorporation of a company, or the charter of a municipality, or any lesser or other thing, so far as this title shows, than the Constitution of a State. You have got the Constitution of the United Kingdom; you have got the Constitution of Canada; and you have got Provincial Constitutions; and this latter it is which is elaborated in the subsequent parts of this division. The name embraces therefore the ideas of Sovereignty and of political organization.

The first sub-head is "Executive Power," the same phrase which was used for Canada, and therefore having the same meaning; and then the 58th section provides:—

> For each Province there shall be an officer styled the Lieutenant-Governor appointed by the Governor-General in Council by Instrument under the Great Seal of Canada.

Then, what, to judge by his name, is a Lieutenant-Governor? He is "the holder of the place" of or for the person in whose name and in whose stead he holds it. He exercises the authority, to the extent to which his Commission or statutory powers give it, of his chief. The fact that this officer is a "Lieutenant," is, to my mind, extremely important as combating the position, which you find stated so strongly in *Lenoir v. Ritchie* by certain of the Judges, that there is no descent or transmission of the Royal prerogative. The Governor-General is admittedly, on the face of the Act, the Queen's representative; he is to govern in Canada in the name of the Queen; and the Governors of the Provinces are his Lieutenants; the Lieutenants of the officer who is acting in the name of the Queen. Therefore I see nothing in the Act inconsistent with, and much to favor the view that all that portion of the Regal power, prerogative power, executive power, which is essential to carry out the objects of the Act, in order to make effectual and complete the exercise of those powers of self-government which were being given to the Province, may be held to be appropriately transmitted to the Provincial authority by a clause which makes the head of the Executive in the Province the Lieutenant of the Governor-General who himself rules in the name and as the representative of the Queen. Besides, that was the old phrase for the Executive heads of two of the Provinces, "The Lieutenant-Governor of New Brunswick," "The Lieutenant-Governor of Nova Scotia," as they were styled just before Confederation; and for the others in earlier years. These were, in their day, the heads of the Executive; they were, it is true, appointed by the Queen directly; but still the phrase was "Lieutenant-Governor."

Now, there is no doubt whatever, that even though the Queen may be unable of her own motion without the action of Parliament to accomplish it, yet Parliament can directly distribute, and can also vest in the Queer the power of distributing her

prerogative, of placing it in whom she pleases. Then when you find Parliament providing that the Governor-General who is to rule in her name may appoint Lieutenant-Governors, there seems to be a clear indication of an intention that there should be, to the extent necessary to carry out conveniently all the objects of the Act, a delegation of the Regal power.

The method of appointing, also is important. It is "by instrument under the Great Seal of Canada." The Great Seal is the recognized instrument of Royal authority. It is the most solemn way in which the Sovereign speaks her will. A Great Seal is said to be the mark of a Sovereign state. Now not merely have the Provinces their own Great Seals; a fact upon which observations are to be made cognate to those which I am now making; but this clause itself provides that the Lieutenant-Governor shall be appointed by the Governor-General in Council by instrument under the Great Seal of Canada. Again you have in the book before you the instrument of appointment, which shows that the Governor-General acts in this regard, as he ought to act, and could alone rightly act, in the name of the Queen; and that it is therefore, the Queen herself through this instrumentality, authorized by the Act of Parliament, who appoints the Lieutenant-Governor of Ontario. The Commission runs in those express words. It is Victoria, Queen, who appoints the Lieutenant-Governor, and appoints him under the Great Seal. Being a Queen's officer in name, as his patent shows, he is a Queen's officer also in nature for the reasons that I have mentioned.

HAGARTY, C. J.—Is that the way it reads? Appointment under the Great Seal in the name of the Queen?

COUNSEL—Yes, my Lord. Your Lordships have it so before you in the Commission.

HAGARTY, C. J.—Is that prescribed, or merely adopted?

COUNSEL.—It is, I apprehend, prescribed by the Act, and to that I attach some importance.

The Executive Government of Canada is carried on in the name of the Queen; and this act is done by the Governor-General under the Great Seal; and under the authority of this Act it is done in the name of the Queen.

> The Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen.
>
> There shall be a Council to aid and advise in the Government of Canada to be styled the Queen's Privy Council for Canada.

Not the Governor-General's Council; they are the Queen's Privy Council for Canada; and it is the "Governor-General in Council" it is therefore, the Governor-General of Canada, as the Queen's representative, acting for her and in her name, on the advice of the Queen's Privy Council of Canada, and under the Great Seal of Canada, who, by the Statute, is to appoint this officer, who thus becomes the Lieutenant of the representative of the Queen; and so may be fairly said to be an appropriate holder of such prerogative power as, in order to make the Constitution efficient, should be exercised by the Executive Head of the Province.

Then the 61st section makes him take and subscribe oaths of allegiance, and oaths similar to those taken by the Governor-General.

The 62nd section shows that he is "carrying on the government of the Province."

> The provisions of this Act referring to the Lieutenant-Governor extend and apply to the Lieutenant-Governor for the time being of each Province or other the chief executive officer or administrator for the the time being *carrying on the government of the Province*, by whatever title he is designated

So that it is quite clear that the Lieutenant-Governor is a person "carrying on the government ef the Province." And, what is "government" in a monarchy? Does not the word necessarily involve the delegation of some portion of the Regal power to the officer "carrying on the government," and being the chief executive officer or Lieutenant-Governor of the Province? I conclude then that the Lieutenant-Governor, who is a Queen's officer, appointed by the Queen through the Governor-General, in the Queen's name, under the Great Seal, who is styled the "Lieutenant-Governor," and the "chief executive officer of the Province" who is "carrying on the government of the Province" is, in his measure, a representative and delegate of Royal authority.

Then sections 63 and 64 are sections which show very pointedly the strength of the argument in favor of the continuance of the old Provinces and of the high nature of the government. Section 63 speaks of the "Executive Council of Ontario and Quebec." After providing a Lieutenant-Governor, you find an Executive Council; and you find that those of Ontario and Quebec are to composed of the following persons:—

> The Attorney-General, the Secretary, and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works within Quebec, the Speaker of the Legislative Council, and the Solicitor-General.

You find, therefore, as was necessary, a definition of those who, in the first instance, should compose the Executive Councils of the two Provinces carved out of the old Province of Canada, and whose machinery had to be set in motion. You find officers mentioned, whose offices contain in themselves indications of this being in its executive as well as in its legislative character, *a government*. You find an Attorney-General, an officer well known under the English Constitution. The Attorney-General is the person serving and acting for the Crown in the capacity of legal adviser. You find a Commissioner of Crown Lands. The public lands are spoken of as Crown lands; and you find amongst the first Executive Council there is to be a person who is to be Commissioner of Crown Lands; thus indicating that the Crown Lands were to be dealt with by the Lieutenant-Governor under the advice of his Executive Council.

Then what do you find in clause 64? For the other two Provinces, Nova Scotia and New Brunswick, in respect of which the necessity to which I have adverted did not arise, the Act says:—

> The Constitution of the executive authority in each of the Provinces of Nova Scotia and New Brunswick, shall, subject to the provisions of this Act, *continue as it exists at the Union* until altered under the authority of this Act.

They were the old Provinces; and the Constitution of their executive authority *continued*. It is not said that Nova Scotia and New Brunswick under this Act shall have the same powers and authorities as the old Provinces of that name had; which would in one sense be quite enough for me; but it is said that the constitution of the executive authority of those existing Provinces is to "con-

tinue as it exists at the Union;" it is kept alive the whole time. There was no necessity to define more particularly; the executive authority continued as it was. So that my learned friend has to show to your Lordships something else in the Act which has taken away that share of Regal power, that delegation of Regal power applicable to local affairs which under the Act still remains and continues in the constitution of the executive authority of Nova Scotia and New Brunswick, before he can establish that that authority is shorn of any part of that power. And all that was continued to Nova Scotia and New Brunswick was vested in Ontario and Quebec.

I ask your Lordships then to decide that it is perfectly plain that all the executive power which existed before the Union, and was required for the doing of the things which after the Union remained within the legislative power of Nova Scotia and New Brunswick, continued, after the Union, of the same nature, of the same quality, of the same character, under this Act; was, notwithstanding the passing of the Act, and even by the terms of it, preserved, and maintained, in its original vigour. And I ask your Lordships, determining thus, to determine also that the nature of the executive authority in Ontario and Quebec is the same as the nature of that in Nova Scotia and New Brunswick. Not that these Provinces had precisely the same powers and authorities. That I know not; about that I care not. Its nature is the same; it was not of a new or different nature, like a delegation to a municipality; but it is of that old nature, which unquestionably included the existence in the hands of the Executive of a portion of the Regal power. It is that old executive authority in nature, in the one case; it is that old executive authority in nature, in the other case.

Then I come to section 65, which is the parallel of section 12 to which I have referred, dealing with the powers, authorities and functions. The same words are used as to the powers, authorities and functions vested in the Lieutenant-Governors, as were used with reference to those vested in the Queen's immediate representative, the Governor-General. The division of power is accomplished by the use of the same language—save of course that which describes the division—the same language in the one case as in the other; the power is of the same quality, of the same nature, in the one case as in the other; the executive authority as well as the Legislative authority is of the same nature; and not merely is it of the same nature as that of the old Provinces; but I ask your Lordships to determine that the executive authority of the Provinces is of the same nature as the executive authority of the Dominion; that the whole body of executive authority was divided; and that the portion assigned to the Provinces came from the same source, was of the same nature, and was of an even higher antiquity, in the case of the Provinces to which it was in substance continued, than it was in the case of the Dominion to which it was, necessarily for the first time, by the Act ascribed.

Then clause 66 places the Lieutenant-Governor exactly in the same position as that in which the Governor-General is placed, under clause 10, in relation to his Council.

Clause 68 speaks of the "seats of government" of the Provinces, just as clause 16 speaks of the "seats of government" of Canada. We find the "seat of the government" of the one, and the "seat of the government" of the other.

So much with reference to Executive Power.

Then, we come to the "Legislative Power," the next heading; being the same phrase, as I pointed out, which is used with reference to Canada.

We find section 69 giving a Legislature for the two Provinces, Ontario and Quebec,—a *Legislature*; a body entrusted with the power of making Laws; not By-laws or Ordinances, but *Laws*; and in the course of the provisions as to the Legislature there is some reference to the Queen's name. Section 72, for example, provides that "The Legislative Council of Quebec shall be composed of 24 members, to be appointed by the Lieutenant-Governor in the Queen's name, by Instrument under the Great Seal"; thus showing that the appointments are to be in the Queen's name, and that the Great Seal is the evidence of that Royal act. It may be difficult to account for, I do not myself apprehend the precise reason for, a special provision in that case; but it certainly cannot be understood to mean that nothing else was done in the Queen's name. Section 75 provides for filling the vacancies in the same way.

Section 82 provides that the Lieutenant-Governors of Quebec and Ontario may from time to time by instrument in the Queen's name call together the Legislatures. That was a mere starting machinery to get them into the same position in which New Brunswick and Nova Scotia were already, through the continuance of their executive authority; into the same position as the Province of Canada occupied in the old times. But those Legislatures are, for all that, Queen-summond—they are to be summoned in the Queen's name; and of course their prorogation and their dissolution must occur in the like mode.

MacLennan, J.—If she came here she could do it herself.

Counsel.—Possibly; unless this Act of Parliament might be deemed to be exclusive; perhaps she might do it, though not without advice; whether she could, and on whose advice, would require consideration. But prorogation and dissolution are not mentioned, and yet nobody imagines for a moment that prorogation and dissolution were not to be accomplished in the same mode as convocation.

Again, as evidencing that executive powers and powers to act in the Queen's name are implied, I may mention that the first Commission and Instructions from the Queen to the Governor-General of Canada comprised a clause giving authority to the Lieutenant-Governors, to prorogue and dissolve the Provincial Legislatures; but on a reconsideration of the whole Commission and Instructions, and upon suggestion made by those then entrusted with the conduct of affairs in Canada that this provision was unnecessary, and that these powers must be held to have been vested in the Lieutenant-Governors of the Provinces by the implications of the B. N. A. Act, the provision was struck out of the later Commissions and Instructions. The force of that suggestion commended it to the Imperial authorities; they no longer attempt to confer that authority, because they feel it to be needless; and the Lieutenant-Governors, therefore, in now proroguing and dissolving in the Queen's name, act upon the view, which I maintain, with confidence, is the sound view, that all executive

authorities required to carry out the provisions of the Act are impliedly vested in the Lieutenant-Governors of the Provinces.

Now, if the constitutions of Canada and of the Provinces are of the same nature—and I think I have shown that the constitution of Canada is of the same nature as that of the Provinces, and that the constitution of the Provinces is of the same nature as that of the old Provinces before Confederation—if these be the facts, the next question is, what is that common nature? As stated in the preamble, it is "similar in principle to that of the United Kingdom." It is the creation of such a Constitution that was being effected. You have a declaration showing the character of the Constitution which the Imperial Parliament conceived it was creating; and if you find these Constitutions to be of the same nature, then the one as well as the other is "similar in principle to that of the United Kingdom." My learned friend, although he did not repeat the quotation here, gave below, and the learned Chancellor in his judgment referred to the somewhat brusque observation of Mr. Dicey that this phrase was an example of "official mendacity"; because according to his view the Canadian Constitution does not accord with the principle of that of the United Kingdom, but is directly opposed to what he conceives to be its vital element. My learned friends rest much upon Mr. Dicey; and, looking at it from a lawyer's point of view, there are many observations in his book which are of great value, pertinent to this question; but it must not be forgotten that its main purpose was to deal with what he calls "the law of the constitution." Although he touches also on what he calls "the conventions of the constitution," yet he deals mainly with that portion of the Constitution which is embodied in rules capable of being enforced by law; and many of his phrases, unless that guiding principle of action on his part be regarded, would be extremely misleading.

To lawyers, jurists and judges it is not permitted to deal with Acts of Parliament after the fashion used by Mr. Dicey in the passage to which I have just referred. Our business is, as I understand it, rather to find reconciling interpretations; to find, rather, meanings for the language of the Legislature which will accomplish its purpose and avowed intent; and curiously enough, if I rightly remember Mr. Dicey's phrase, he omits that very word which creates the distinction. He says that Parliament indicated a desire on the part of the Provinces to be united into one Dominion, omitting the word "*federally*." The phrase is "to be *federally* united into one Dominion" under a Constitution according to the principle of the British Constitution.

Well, of course if *the principle* of the British Constitution is so emphatically, so entirely, so exclusively one Sovereign Legislature, as distinguished from that division of the legislative powers which, whatever the details, is an essential element of every federal constitution, it might perhaps be an example of "official mendacity" to say that a federal union could be formed according to the principle of the British Constitution. Doubtless, as Mr. Dicey observes, no federal union can consist with absolute Sovereignty in any one central Parliament; because the security of the federal element of the union depends upon the division of the powers, and a central Legislature, which can do as it pleases with the powers, can destroy, alter, and re-make, as it pleases, the federal character of the constitution. But, as I say, lawyers and jurists and judges must look for some other meaning in this clause, and some meaning which shall not make it an example of "official mendacity," but which shall make it true, and give to it a force, and power, and interpretation which shall be effectual; and this I venture to say we can find from Mr. Dicey's own book. No doubt the principle to which he adverts as the essential element of the British Constitution, namely that there exists, not merely practically, but technically and legally, one Sovereign Legislature, the principle of an entire and undivided Parliamentary Sovereignty, is one of the characteristics of the British form of constitutional government; but yet that obviously is not the principle to which Parliament was in this phrase adverting; because the Union is here spoken of as a "federal Union." We must turn to another, and as I submit to the central and vital principle of the British Constitution, to one well known to us, and exemplified in the earlier as in the later history of the constitutional struggles on this Continent, to the principle to which the learned Chancellor looks, to a principle which Mr. Dicey himself acknowledges may exist in a constitution not based on one Parliamentary sovereignty. In no less than two passages of the same learned author's book you will find allusions to the Belgian Constitution, in which he declares that it, a written constitution, not alterable by the Parliament itself, and therefore not possessing this element of Parliamentary sovereignty, is a very close transcript of the British Constitution put into writing. That great difference exists; but notwithstanding that difference, it is, he agrees, a close transcript of the British Constitution.

I ask your Lordships then to find that the principle of the British Constitution here referred to, the principle which I invoke as giving the powers for which I contend, is that of free and representative and responsible Government, embracing an Executive, invested doubtless with great powers, but exercising those powers always upon advice; the givers of which advice are responsible to a free and representative Parliament; which Parliament is responsible to the electors, of whom we speak as the people. That the laws are to be made, the taxation to be imposed, the executive to be controlled by the popular assembly, always the chief, is by degrees becoming more and more absolutely the essential element. *The principle is responsible Government.* That is the principle. We have been familiar with it here from very early days, anterior to and during the revolutionary struggle in the southern portion of this Continent, as bearing on the condition of the old colonists of North America. One of the greatest speeches of Edmund Burke, delivered during the crisis of that struggle, depicted the condition and the reasonable desires of those colonists. He pointed out that up to that time the main point on which, in England itself, the attention of the masses had been concentrated, round which the battle for freedom had raged, and which had naturally enlisted the attention of the newer England, as drawing light from the lessons of old England, was the point of taxation. He pointed out that England at the time he spoke was binding her Colonies commercially in the straitest bonds; but that, while used to, and through habit bearing those commercial bonds, those fetters on trade and

manufactures, hey found their compensation in the allowance, in all other respects, of the form and the substance of the British Constitution, in the possession of practical freedom, of practical self-government, of the exclusive power of local taxation. But, he said, if you add to your monopoly in binding their trade a claim to tax them too, you make their condition slavery. They are prepared, for the compensations, to continue to bear the one; they will not endure the addition of the other. Thus, that great man described the existing powers of local free self-government; and thus he pointed to the weak spot, to that which easiest roused their attention, and stirred their jealousy, their aversion to the notion that taxation should be laid upon English subjects, on either side of the Atlantic, by any others than themselves. That, as he argued, had been the centre around which the constitutional struggles of England herself had been fought; that had been the fortress of English liberties; to deny it to their English fellow subjects in America would be alike futile and dangerous; and he asked that the claim should be renounced. The claim was in the end renounced, although too late for the immediate object; and Mr. Dicey, giving an example of fundamental laws (which yet, as he says, the Parliament of Great Britain has, of course, the technical power if it pleases to repeal) cites, as the most cogent and illustrative example of laws which are after all practically irrepealable, the law declaring the renunciation of that power of taxation.

Well, in those old days, when the Regal power was so much more imposing in form, and indeed so much greater in substance, than it has in these later days become—in those old days, even as to colonies of inferior and different natures, as to the constitution of their executive authority, from ours—in those old days, with respect even to colonies, whose charters were so democratic that their inhabitants had the power to elect their own Governors, this prerogative of pardon appertained to the locality, belonged to the colony, was exercised by the head of the Executive. A Governor, though elected under a democratic charter by the people, was entitled to exercise the prerogative of pardon. The Deputy of the Proprietor of a colony, as in the case of William Penn's colony, now the great State of Pennsylvania, exercised that prerogative. So far was it from being incommunicable; so far was it from being an exclusive or peculiar prerogative of the Crown; so far was it from being a power to be exercised only by someone specially chosen by and having the special confidence of the Monarch, that a man elected by the locality, or a man nominated by the subject Proprietor of the soil, the man, however chosen, who possessed the executive power, was, even in those old days, competent to exercise the prerogative of pardon.

After the Revolution, our own country, so far as it was not occupied by the old subjects of France, was settled very largely, in the first instance, by those who had opposed the Revolution, had adhered to the British Crown, and preserved, under very difficult circumstances, their attachment to Monarchical institutions. For a considerable time, and reasonably at first, having regard to the extremely rudimentary character of the settlement, to the enormous area of territory, and to the sparseness and poverty of the population, a kind of semi-paternal government was exercised; all the more readily borne by reason of these views of the United Empire Loyalists. But from time to time, as we know, there came demands for greater freedom of action; and the form of our struggle here was the fight for what was popularly known as Responsible Government. It did not turn, of course, upon that which had been renounced, and renounced forever, the question of taxation; but it turned upon the other elements of Responsible Government. Matters there were doubtless which came near to the money question. What the people of the northern portion of the continent demand in these as in other matters, was the application of the great principle that the executive authority, while continuing to be exercised in the name of the Crown, should, in local affairs, be exercised upon the same principles, under the same responsibility, with the same rights, and subject to the same securities to the people governed, as within Great Britain herself with regard to the British subjects inhabiting the British Isles. That, shortly, was the demand; and what were the answers? Two mainly. First it was said that the step would endanger the connection of the country with the mother land; next it was said that the people of the Colonies were not wise enough to govern themselves. Well, the answers were disputed; sometimes by argument and agitation; sometimes by insurrection; and in the end it was seen that the only way to carry on affairs was to recognize the principle of Responsible Government in all things which did not directly concern the Imperial power, or Imperial interests; to concede in the fullest and largest degree local government in local affairs. Thus *Responsible Government*, which we here had during these struggles consecrated as the vital principle of the of the British Constitution, was introduced among us. Thus that principle, which you will find expounded by Mr. Dicey when he comes to deal, as in various parts of his work he does deal with the other part, the extra legal part, the unwritten or conventional part of the Constitution, that part which is not embodied in laws capable of being enforced in the Courts, was recognized here,—the principle, namely, that it is the people at large who govern themselves, who are self-governing, through the medium of their elected representative Assemblies, which Assemblies substantially choose their executive councillors, which councillors advise the Head of the Government, which Head acts upon that advice. Thus a chain is formed between the people and the Crown; a link is created between the governing and the governed; and the whole question is so solved. It is then upon that great and central principle of the British Constitution, applied to the locality with reference to all matters which concern the locality, that we are, as I maintain, to interpret this Constitution; and that, of course, not merely as to the Dominion of Canada, but also as to the Provinces of Canada.

Now a line of demarcation, however vague, must be stated; and the only tangible line is that between Local and Imperial interests. And it will be found not uninteresting to remark that, in this very question of the power of pardon, Imperial interests may, to some extent, intervene; that their possible existence has been recognized; and that they furnish an admitted possible ground for Imperial intervention, by the exercise of the power of pardon in certain instances, however rare, in which perhaps the Local authorities might not be disposed to exercise it.

Turning again to the clauses of the Act, the view that ours is a government founded on that principle of the British Constitution which I have described, is enforced once more by the suggestion as to the old Provinces. Section 88 continues the constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick as it exists at the Union. They are not re-made, they are not created, they are continued.

Clause 90 applies to each of the four Provinces very important provisions, made in the constitution of Canada—all of a political and constitutional nature—provisions as to appropriation and tax bills, recommendation of money votes, assent to bills, disallowance of Acts, and so on, showing once again the identity in nature of the two constitutions, that they are not different, one being of inferior order or character to the other, but that they are the same in nature; and in truth it is by reference to the one that these most important constitutional elements are imported into the others.

Then, under head 6 you find the distribution of the legislative powers. I call your Lordships' attention to that, because, as I have said, I read the whole constitution together, in order to find from the nature of the legislative, a clue to the nature of the executive authority. Here it is proposed to deal with the legislative powers of Canada and the Provinces. What phrase is used? "Distribution of legislative powers." One mass of legislative powers; the same powers; powers of the same nature; powers of the same character, are dealt with together; and of these one portion is assigned to the Parliament of Canada, and another portion to the Legislatures of the Provinces. "Distribution of the legislative powers." The mass is divided. You cannot say that that portion of the mass which is handed over to the Provincial Legislature is handed over as of any different essence, of any inferior kind, of any lower nature than that which is handed over to the Canadian Parliament. "Powers of the Parliament" is the sub-head for Canada; and when you come to the portion of the Legislature, while you find the mass divided between the two, the only difference you see is this, that no less than three times there is jealously repeated a reference to the "*exclusive* powers of the Provincial Legislatures" as distinguished from the powers of Parliament; so that any distinction is in favor rather of the Legislature than of the Parliament.

Then when you come to 92:—"Exclusive powers of Provincial Legislatures," you find "the amendment of the Constitution," a power of the very highest and most sovereign character. The B. N. A. Act, therefore, may be amended by the Provincial Legislature in this most vital point, a power which the Canadian Parliament does not enjoy as to its constitution, a power which indeed could not there subsist without certain safe-guards, checks and limitations, else the federal form of the constitution and the compact on which it was based would be imperilled. The Canadian Parliament has at present no power of amending the constitution of Canada; while the Provincial Legislatures have power to amend their constitutions, except with regard to the Lieutenant-Governor. But for that limitation, as already explained, they might break the link altogether; they might forbid his communicating with the Governor-General; they might alter the tenure of his office; they might abolish it altogether. To avoid such possibilities was the purpose of the exception. But inasmuch as they have power to amend the Constitution, except as regards the Lieutetenant-Governor's office; and also, by the 64th section, to which I have referred, have power to abolish or alter his functions and authorities; it is clear that in all things, with the exception of a constitutional amendment affecting his office, they have power to deal even with the Lieutenant-Governor.

It is as I have said *the Constitution* itself which is in this respect, not amendable. "The amendment of the Constitution of the Province" There is no limit as to the amendability or repeal of Acts existent at the date of, or which might be passed thereafter under the Constitution. And, as I have tried to point out to your Lordships, the unity of the executive authority would be imperilled, and the very object which was contemplated by the reservation impaired by any other view. I submit that the Province can add to the executive powers of the Lieutenant-Governor in Provincial affairs, when necessary in order to render more efficient the administration of those affairs; when required in order to effectuate legislative provisions; and in all respects, germane to his office, in which further grants of executive power may be usefully given to that officer. And I point out that it is impossible that by such action the Dominion authority or his position can be affected; on the contrary the Province thus magnifies his place. It can then give these powers. If not the only alternative is that it must set up some other officer. But I do not understand the position that such additions as I suggest can be made to be seriously controverted.

(Adjourned 5 p.m. until 11 a.m. October 2nd.)

MR. BLAKE resuming—I had finished my remarks with reference to the first article of clause 92 of the Act, and was about to point out to your Lordships that there is in that clause a whole series of what may be called Sovereign powers in the matter of law making; but I wish to call your Lordships' attention to the fact that the power of law making is very wide as defined at the commencement of clause 92.

> The Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated.

Laws which are "*in relation to matters coming within the enumera ed classes of subjects*" are laws within the exclusive power of the Legislature. The phrase is one the terms of which are perhaps impossible of enlargement, and are certainly much opposed to the narrow construction which my learned friend suggests as to the legislative power. It seems to me that a Legislature which may make laws "in relation to matters coming within the classes of enumerated subjects" may make a law to supply any defect, and to grant power to deal with any phase of any matter involving administrative action, for the more perfect operation of existing laws, or the more complete execution of the will of the Legislature, as defined in any existing law, as well as in connection with contemporaneous or future legislation.

The articles to which I particularly call your Lordships' attention, as indicating a sovereign law-making, and as of course a complementary sovereign executive power, are:—Taxation; Rais-

ing money on the credit of the Province; The establishment of Provincial officers; The management and sale of public lands (which are the Crown lands); Prisons; Municipal institutions, (which we can make and unmake, and therefore are not ourselves); Licenses; Public works; The incorporation of companies; Property and civil rights; The administration of justice, with certain exceptions, but including the imposition of punishments to the extent necessary to render effective our legislation on any subject. If it were not that the making of the criminal laws, and the appointment of the Superior and County Court Judges, are abstracted from the Local and placed within the Federal jurisdiction, the whole adminstration of justice would be Provincial.

Even as to judicature, while the Superior and County Court Judges are removed, the Magistracy and the Courts of inferior jurisdiction are left. As it is, as I pointed out in *The Queen v. Wason*, the main part of the sovereign Legislative power is Provincial.

I defer a reference to the specialties of Pardon, which might naturally arise upon this question of the administration of justice; thinking I can more clearly deal with it by concentrating my positions in a later part of my argument.

It is clause 109 that deals with the Crown lands, Mines and Royalties; and, upon that, very pertinent observations with reference to mines and royalties are to be found, as I will show your Lordships presently, in cases decided by the highest tribunal.

The 117th clause shows that the Provinces *retain* their property; another phrase, in addition to those which I have already pointed out, indicating the continued existence of the old Provinces; it is not a granting of the property, but a retaining of the property that is effected; and upon this I would also refer, for the sake of brevity, to my printed argument in *St. Catharines v. the Queen*, the Ontario Lands Case, which deals with that phase of the construction of the B. N. A. Act.

Clause 126 deals with that portion of the duties and revenues reserved to the Provincial Governments and Legislatures--not granted, but *reserved* to the Governments and Legislatures; and forms of them a consolidated revenue fund for the Province, just as clause 102 does for Canada; another example of the identity in nature of the constitution and the constitutional powers of the Dominion and of the Provinces.

Clause 129 continues all commissions, powers, authorities, laws, and so forth, subject to be repealed or altered by Parliament or the Legislature according to the authority of Parliament, or of the Legislature, under the Act. Each is thus continued for each jurisdiction, subject to repeal or alteration by the appropriate body, according as the division of powers throws the subject matter within the jurisdiction of the local or the federal authority.

Clause 134 authorizes the Lieutenant-Governors of Ontario and Quebec, under the Great Seal, to appoint political officers, ministers, including the Attorney-General, and the Commissioner of Crown Lands; the Great Seal being, as I said, the recognized instrument of the manifestation of the Royal will.

Clause 135 vests in the members of the Government to be appointed by the Lieutenant-Governor, until the provisions are changed by the Legislature, all authorities and functions of the old members of the old Government; once more shewing that it was the old constitution which was continued and kept in force; save to the extent to which it was necessary to provide new machinery, in order, first, to the re-division of the Province of Canada into its old parts, Upper and Lower Canada, and secondly, to the establishment of the limitations required by the adoption of a federal constitution.

Clause 136 provides that the Great Seals of Ontario and Quebec shall be, until altered by the Lieutenant-Governor, the same as those of old Upper and Lower Canada. There you find once again an evidence of the restoration, or re-creation, or revival, or resurrection of Upper and Lower Canada. You find that their Great Seals are provided, and that the Lieutenant-Governor is indicated as the power to alter their Great Seals. But you find nothing whatever about the Great Seals of Nova Scotia and New Brunswick. Why? Because in their cases, where the existing entity was not being changed, there was no need so to provide. The constitutions in both the executive and legislative branches of Nova Scotia and New Brunswick were continued, subject to certain changes. Therefore, there was no necessity to deal with their Great Seals, and their Great Seals were, without provision, the same old Great Seals. As a fact, it may be observed that subsequently, shortly after Confederation, the Queen caused Seals to be designed and provided for all four of the Provinces, and for Canada, and that a combination of those Seals which were suggested to and accepted by the Provinces formed the Seal for Canada.

Clause 140 provides that:—

> Any proclamation which is authorized by any Act of the Legislature of the Province of Canada to be issued under the Great Seal of the Province of Canada whether relating to that Province or to Upper Canada or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant-Governor of Ontario and Quebec, as its subject matter requires, under the Great Seal thereof; and from and after the issue of such Proclamation the same and the several matters and things therein proclaimed shall be and continue of the like force and effect in Ontario or Quebec as if the Union had not been made.

Now, before passing to some of the authorities which illustrate the meaning to be given to the relevant provisions of the B. N. A. Act, I wish to refer to a few definitions of some of the phrases already quoted.

Worcester's definition of the words "*Great Seal*":—

"The principal Seal of a Sovereign or of the chief executive officer of a Government for the sealing of Charters, Commissions, etc."

Worcester—"*Lieutenant*; one who supplies the place of a superior in his absence, a deputy."

"*Lieutenant-Governor*; An officer next below the Governor, and who acts as chief magistrate in case of the Governor's death or resignation; a Deputy-Governor. In some English Colonies jointly under a Governor-General, the chief magistrate of a single colony."

Webster—"*Lieutenant*; an officer either civil or military, who supplies the place of his superior in his absence."

Webster—"*Executive*; (The noun) The chief officer, whether King, President, or other chief magistrate, who superintends the execution of the laws, the person or persons who administer the Government; executive power or authority in Government."

Webster—"*Executive*; (the adjective) In Government, Executive is distinguished from legislative and judicial; Legislative being applied to the organ or organs of Government which make the laws; Judicial, to that which interprets and applies the laws; Executive, to that which carries them into effect."

Imperial Dictionary—*Executive*; (the noun) is defined just as I have already read it from Webster.

Imperial Dictionary—"*Executive*; (adjective) Having a quality of executing or performing; as, executive power or authority; an executive officer; hence, in Government, Executive is used in distinction from Legislative and Judicial. The body that deliberates and enacts laws, is Legislative; the body that judges or applies the laws to particular cases is Judicial; the body or person who carries the laws into effect, or superintends the enforcement of them, is Executive."

Worcester—"*Executive;* (noun) The executive power; the person or the power that administers the Government; an executive officer.

"The word is sometimes so used in England, but this use of it was first introduced into this country; and it is now commonly applied to the President of the United States. The Constitution of the United States has the phrase 'Executive power,' but not simply the 'Executive.'"

Turning to the authorities, I have tried, although they are perhaps inextricably interlaced, to draw some distinction between those which touch more directly on the legislative and those which touch more directly on the executive power; and I trouble your Lordships first with a reference to those which deal more directly with the legislative power, throwing, as they do, clear light upon that executive power, which is, as I maintain, co-extensive with the other.

Queen vs. Frawley, 2 Cart., p. 576. At p. 591, Spragge, C. J. quotes Chief Justice Marshall's statement of the powers of Sovereignty as divided between the Government of the Union and the Governments of the States, pointing out that

They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.

He quotes further:—

It may, with great reason, be contended that a Government entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.

Then Spragge, C. J. proceeds to observe:—

The powers assigned by the Confederation Act to the Provincial Legislatures are large and various; and it is not too much to say that it is a reasonable contention that Legislatures entrusted with such powers, on the due execution of which the happiness and prosperity of the Provinces so largely depends must also be entrusted with ample means for their execution. The learned Chief Justice had to meet this difficulty, that the Constitution of the United States does not confer upon Congress power, as the Confederation Act confers upon the Provinces power, to make laws "In relation to" the enumerated classes of subjects; but only such powers as may be "necessary and proper" for carrying them into execution. After commenting upon and interpreting the language used, the Chief Justice proceeds: "so with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the Constitution? All admit that the Government may legitimately punish any violation of its laws; and yet this is not among the enumerated powers of Congress....." The good sense of the public has pronounced without hesitation that the power of punishment appertains to sovereignty, and may be exercised whenever the Sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indespensibly necessary. It is a right incidental to the power, and conducive to its beneficial exercise."

Then after another quotation Spragge, C. J. says:—

It enunciates clearly and forcibly, constitutional doctrines which, from the nature of the Constitution of the United States, have been necessarily presented to the consideration of the Judges of that country more than has been the case in England, and which, since Confederation, have an important bearing upon the powers of the Dominion and Provincial Legislature.

Severn v. The Queen, 1 Cart., 414. At page 453 Strong, J. says:—

I think everything indicates that co-equal and co-ordinate legislative powers in every particular were conferred by the Act on the Provinces, and I know of no principle of interpretation which would authorize such a reading of the B. N. A. Act, as that proposed. Had such been the design of the framers of the Act, the meaning of which I can only discover from the words in which it is expressed, we should have found the case provided for.

Hodge v. The Queen, 3 Cart., 144. Spragge, C J. at page 167 says:—

Looking at the classes of subjects legislation upon which is committed exclusively to the Provinces, it is very apparent that it was intended that their Legislatures should possess very large and ample powers in relation to all subjects of a local and domestic nature. They had possessed plenary powers upon these subjects before Confederation; and the general scheme of Confederation appears to have been to leave to them the plenary control of these subjects. They were, under the Act, Legislatures in regard to these subjects in the true and full sense of the term. This is the more apparent from the use of the words "exclusive" and "exclusively," (and they are used repeatedly) in the Imperial Act. Other legislation upon these classes of subjects is excluded. No alteration, no amendment, no perfecting of any measure, falling within these classes of subjects, can be made by any authority outside of the Provincial Legislature. It is therefore necessary that the Provincial Legislature should possess plenary power in relation to all these subjects, to change, amend, repeal, re-enact, and in short to deal with them as change of circumstances or other exigencies might render proper; the propriety of changes in any shape made, not to be challenged by any other legislative authority, and the power to make them being limited only by the rule, whether the law making the change is within the class of subjects legislation upon which is assigned to Provincial Legislatures.

At page 181 Burton J. says:—

Every Government which is supreme must have the capacity to make its own commands obeyed. The Provincial Legislatures, as I have shewn, within their respective spheres, are absolutely supreme. It follows that wherever the Provincial Legislatures have power to enact any particular measure, whether they may require anything to be done or forborne in carrying out the powers granted to them by the Imperial Parliament, they must have of necessity the power to enforce, and we should not look for any express power but for the fact that the criminal law generally is given to the Dominion. Hence it became necessary to give express and exclusive power to the Provincial Legislatures to declare acts of disobedience or acts which have a tendency to interfere with the proposed measures to be crimes, and affix such punishments as it deemed proper.

And at page 182:—

It would seem almost a misapplication of terms to refer to the Provincial Legislature as exercising a delegated authority in the sense of being an agent of the Imperial Parliament. The Imperial Parliament has the power, no doubt, to pass laws such as those passed by the Local Legislature and affecting all Her Majesty's subjects in the Province, but it is equally clear that it is a power existing in name only, and one which it would never attempt to exercise, and therefore the Parliament of the Province cannot in that sense be spoken of as exercising a delegated authority.

It is true that Parliament gave both to the Dominion and to the Provinces the constitutions under which we live; both limited in extent, but both giving representative insti-

tutions, and giving to the Legislatures elected in the manner therein pointed out, plenary powers of legislation within their respective spheres as large and ample as those of the Imperial Parliament itself. The Legislatures so elected have a delegated authority it is true, but it is of the same character as that of the Imperial Parliament, who are collectively the delegates of the whole people.

Queen v. Burah. At page 188 of 3rd Cart., there is a passage cited from Lord Selborne's judgment :—

The Indian Legislature has powers expressely limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.

Queen v. Hodge, 3rd Cart. At page 162, Privy Council Judgment, is to be found the well-known passage, speaking of the misconception as to the true character and position of the Provincial Legislatures ; stating that they are in no sense delegates of or acting under any mandate from the Imperial Parliament ; that the authority is as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament possessed itself and could bestow ; that within those limits

the Local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect. It is obvious that such authority is ancillary to legislation ; and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation, entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a Legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact; and can, whenever it pleases, destroy the agency it has created, and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each Legislature, and not for courts of law, to determine.

* * * *

The Provincial Legislature, having thus the authority to impose imprisonment with or without hard labour, has also power to delegate similar authority to the municipal body which it created, called the License Commissioners.

Bank of Toronto v. Lambe :—My reference is to L. R,; 12 App. Cas., p. 586 :—

Then it is suggested that the Legislature may lay on taxes so heavy as to crush a bank out of existence, and so to nullify the power of Parliament to erect banks. But their Lordships cannot conceive that when the Imperial Parliament conferred wide powers of local self-government on great countries such as Quebec, it intended to limit them on the speculation that they would be used in an injurious manner. People who are trusted with the great power of making laws for property and civil rights may well be trusted to levy taxes. There are obvious reasons for confining their power to direct taxes and licenses, because the power of indirect taxation would be felt all over the Dominion. But, whatever power falls within the legitimate meaning of classes two and nine, is, in their Lordships' judgment, what the Imperial Parliament intended to give ; and to place a limit on it because the power may be used unwisely, as all powers may, would be an error, and would lead to insuperable difficulties, in the construction of the Federation Act.

The Atty-Genl. of British Columbia v. Atty-Genl, of Canada; 14 App. Cas. 295: *Arguendo* by Counsel for the Atty-Genl. of Canada ; at p. 298 and at p. 301 there are phrases which are important as indicating the view of the Counsel for the Dominion.

At page 302 there is a discussion by the Court in which they point out that, according to the law of England, gold and silver mines, until they have been actually severed from the title of the Crown, and vested in a subject, are not regarded as *partes soli* or as incidents of the land in which they are found. Not only so, but the right of the Crown to land and the baser metals which it contains stands upon a different title from that to which its right to the precious metal must be ascribed, and they show that

mines of gold and silver within the realm, whether they be in the lands of the Queen or of subjects, belong to the Queen by prerogative, with liberty to dig and carry away the ores thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore.

After that statement of the nature and character of the title to the precious metals,

In British Columbia, says the Court, the right to public lands, and the right to precious metals in all Provincial lands whether public or private still rest upon titles as distinct as if the Crown had never parted with its beneficial interest; and the Crown assigned these beneficial interests to the Government of the Province, in order that they might be appropriated to the same State purposes to which they would have been applicable if they had remained in the possession of the Crown. Although the Provincial Government has now the disposal of all revenues derived from prerogative rights connected with land or minerals in British Columbia, these revenues differ in legal quality from the ordinary territorial revenues of the Crown. It therefore appears to their Lordships that a conveyance by the Province of "Public Lands" which is, in substance, an assignment of its rights to appropriate the territorial revenues arising from such lands does not imply any transfer of its interest in revenues arising from the prerogative rights of the Crown.

So it happened that a transfer by the Provincial Government of British Columbia to the Queen as representing the Dominion of Canada of a large block of the Crown lands was held to transfer the soil only of Crown lands, not including the prerogative rights with reference to the precious metals, but on the contrary excluding those prerogative rights, which remained in the Government of British Columbia. So thorough and full was the transfer of prerogative right to the Province, and so narrow was the construction to be given of the grant which the Provincial Government made of the Crown lands, that the Court held first that the Province obtained, and secondly that it did not, by its conveyance of the land to the Crown in the interests of Canada, part with, the prerogative rights to the precious metals.

BURTON, J.—I understand you to say that was without any exception in the grant ?

COUNSEL—Without any exception in the grant. It was held to be another and different title, a prerogative right which the Crown was not to be assumed to be granting, of which the Crown in British Columbia was not, even by its transfer to the Crown in Canada, disposing; but which it retained; thus throwing, I think, a very strong light upon the sovereign character of the powers and upon the high position of the Provinces.

I refer also, without reading the quotation, to the judgment of the Chief Justice of this Court in 17 Ontario, 231, *Queen v. Wason*, and to the judgment of Osler, J. at page 243.

Endlich on the *Interpretation of Statutes*, section 535, page 753 :—

Whatever is indispensable to render effective any provision of a constitution, whether the same be a prohibition or restriction, or the grant of a power, must be deemed implied and intended in the provision itself, so that, wherever a general power is given or duty enjoined, every particular power necessary for the exercise of the one and the performance of the other is given by implication."

Cooley's Constitutional Limitations, 4th edition, chapter 4, page 77 :—

The implications from the provisions of a constitution are sometimes exceedingly important, and have large influence upon its construction. In regard to the constitution of the United States the rule has been laid down that where a general power is conferred or a duty enjoined, every particular power necessary for the exercise of the one, or the performance of the other, is also conferred. The same rule has been applied to the State constitution, with an important modification, by the Supreme Court of Illinois.

It quotes the rule as stated. The rule applies to the exercise of power by all Departments and all officers.

Powell v. Apollo Candle Company, 3 Cart., page 442. After citing two passages in Queen v. Burah and Hodge v. The Queen, to which I have already referred :

These two cases have put an end to the doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a Legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or delegate.

And in the report of the same case in L. R. 10 App. Ca., page 291 :—

It is argued that the tax in question has been imposed by the Government, and not by the Legislature, who alone had power to impose it. But the duties levied under the Order-in-Council are really levied by the authority of the Act under which the order is issued.

There the contention was that the Constitutional Act authorized the Legislature to levy duties ; but that it did not authorize the Legislature to empower the Governor to levy duties, a power which they had assumed to give. But the judgment says :—

But the duties levied under the Order-in-Council are really levied by the authority of the Act under which the order is issued.

The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him.

So that the method of handing over the legislative function to the Executive was expressly recognized as competent ; and that even with reference to the important and peculiar question of taxation.

Now, with reference to the authorities, which, dealing more or less with the same subject, touch a little more nearly or expressly, upon the executive power. I may refer your Lordships in the first place to a statement made in "*Todd's Parliamentary Government in the British Colonies*," pages 398 to 403, with all of which I do not find myself able to agree, but the general statement of which is, I think, fairly accurate, and at any rate, worth perusal. It deals with the position claimed for the Lieutenant-Governors of the Provinces of Canada, concluding with the statement :—

It is evident, therefore, that, in a modified but most real sense, the Lieutenant-Governors of the Canadian Provinces are representatives of the Crown.

I also, in the same connection, refer to an article in Rose-Belford's *Canadian Monthly*, of which I happen to have a separate print which I will hand in for the convenience of the Court, called "A sketch of the prerogative of the Crown in Colonial legislation." It is by Mr. Hodgins, the present Master of the Court of Chancery. It contains a very large number of references to the authorities, and to the methods in which the prerogative was exercised in the early Colonies, and will, therefore, enable me to omit the detailed statement which I might otherwise have felt it my duty to make of the position in the old Colonies before the Revolution, a point to which I have already briefly adverted.

The case of *Theberge v. Laundry*, in 2 Cart., page 9, is not wholly unimportant. There the Privy Council had to deal with the question whether there existed a right to appeal from a decision of a Tribunal empowered by the Legislature of Quebec to deal with matters of election to the Assembly of that Province. The Court says :—

These are considerations which lead their Lordships not in any way to infringe, which they would be far from doing, upon the general principle that the prerogative of the Crown, once established, cannot be taken away, except by express words :—

for that was the suggestion there, not that it could not be taken away at all, but that it could not be taken away except by express words—

but, to consider with anxiety whether in the scheme of this legislation it ever was intended to create a tribunal which should have, as one of its incidents, the liability to be reviewed by the Crown under its prerogative. In other words, their Lordships have to consider, not whether there are express words here, taking away the prerogative, but whether there ever was the intention of creating this tribunal with the ordinary incident of an appeal to the Crown.

I need hardly say that that seems to be another mode of arriving at the same conclusion. It it be indicated by the Act, or by the circumstances, that the tribunal is intended by the Legislature to be created, without the incident of an appeal to the Crown—whether that indication be effected by some other means, or by an express statement that there should be no appeal, seems to me to be indifferent.

In the opinion of their Lordships, adverting to these considerations, the 90th section, which says that the judgment shall not be susceptible of appeal, is an enactment which indicates clearly the intention of the Legislature under this Act—an Act which is assented to on the part of the Crown, and to which the Crown, therefore, is a party—to create this tribunal for the purpose of trying election petitions in a manner which should make its decision final to all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative.

Well, that statement is also important as indicating the view of the Judicial Committee, that the Provincial Acts were assented to on the part of the Crown, and that the Crown was to them a party. Of course, we know that is the form in which the Provincial Acts were, whether accurately or inaccurately, framed from the time of Confederation onward, in at any rate both Ontario and Quebec, which followed in that respect the course pursued in the old Province of Canada.

I may say I regard it as utterly immaterial, with reference to any of the questions now in hand, whether that form be or be not the accurate form under the B. N. A. Act. It was not the form in Nova Scotia and New Brunswick. In neither of them as I think was the Queen's name used before Confederation. So, in several of the old Colonies; as your Lordships will find by the pamphlet to which I have referred, the power of legislation granted was not exercised in the name of the Queen. But the effect of the Acts in all their aspects, the range of the powers of the Legislature and of the Executive, in every respect, remained unaffected by the circumstance that the Queen's name was not used.

The *Queen v. Amer*, 1 Cart. The judgment of Wilson, J. at p. 735, deals with the exclusive power of the Legislature of Ontario to make laws in relation to "the administration of justice" and points out that there has been no legislation by

Ontario declaring that the Lieutenant-Governor may issue commissions for holding Courts of Assize; but shows that by section 65 of the Act the power was exercisable as an old power, vested in the old Lieutenant-Governor of Upper Canada before the legislative Union of Upper and Lower Canada, and by the Governor-General after that Union; and that there could be little doubt that the Lieutenant-Governor of Ontario has the power to issue the commissions.

The *Queen v. Bennett*, 2 Cart., p. 638. The judgment of Cameron, J.:—

The only remaining question is, the status of the police magistrate. This involves the important Constitutional question, in which Government and Legislature rests the power of appointing or making laws for the appointment of police magistrates and other justices of the peace. The first Act of the Legislature respecting the appointment of justices of the peace since the creation of the new Constitution of the Dominion and Provinces under the British North America Act, 1867, was passed at the first session of the Local Legislature on the 4th March, 1868. I was then a member of the Executive Council of this Province, which was responsible for the introduction of the bill that afterwards passed into an Act of the Legislature. The British North America Act made no express provision on the subject of the appointment of justices of the peace, or any officer connected with the administration of justice inferior or subordinate to the Judges of the Superior and County Courts. From the increase in the population in the old, and the settlement of new portions of the country, it was necessary that provision should be made for the appointment of justices of the peace, as it was conceived that without legislation there was no power of appointment resting in the Lieutenant-Governor or the Governor-General. From the absence of express provision in the British North America Act, and the vesting in the Local Legislature of the Province the exclusive power to make laws in relation to the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, it was conceived the power to pass such a law must rest exclusively with the Local Legislature. The view that the Executive Council as a whole, or any individual member of it, entertained, leading to the introduction of the enactment, is of no consequence if the Act is in fact *ultra vires*, and I merely refer to that view as indicating the question now raised, was present to the mind of the framers of the Act, and it is only reasonable to assume it was present to the Governor-General of the Dominion when the Act was communicated to him, and not disallowed under the power of disallowance vested in him under section 90 of the B. N. A. Act. I assume there is no doubt that the appointment of Justices of the Peace was a prerogative of the Crown, but the Legislature of Upper Canada and the Parliament of the Province of Canada have assumed, without the power so to do having heretofore been questioned, to legislate in reference to their jurisdiction and qualification.

The learned Judge proceeds to distinguish the case of Lenoir v. Ritchie, and the view of the Supreme Court, from the case in hand. "The office of the Police Magistrate," he then goes on to say,

is the simple creation of an Act of the Legislature, and in creating the office it had, when not in conflict with the express or implied powers of such Legislature, or in excess thereof, the right to determine how the appointment should be made. The power of appointment under the Act in question is given to the Lieutenant-Governor in Council, as the power was given under chapter 101 of Consolidated Statutes of Canada to the Governor-General in Council, to appoint Magistrates or Justices of the Peace under the Act.

Then at page 642 he proceeds:—

But in my opinion Justices of the Peace are part of the system of the administration of Justice in the Province, and therefore under sub section 14 of section 92 of the B. N. A. Act, the right to legislate as to their appointment is expressly conferred upon the Legislature of the Province; and therefore Mr. Young was duly appointed Police Magistrate for the County of Halton. This view is supported by the provision contained in section 96, giving the appointment of Judges in the Superior District and County Courts to the Governor-General, and no provision being made for the appointment of any subordinate officer or authority in connection with the administration, indicating that the intention of the Imperial Parliament, under the assignment of the power to make laws relating to the administration of Justice to the Local Legislature was to give such Legislature full power to legislate as to the appointment of all officers connected with the administration, except the Judges, in respect to whose appointment the appointing power was expressly indicated.

I repeat, without enlarging upon it, the argument which I made in Queen v. Wason before your Lordships, to this effect, that, but for the circumstance that it was intended to divorce from the general subject of administration the appointment of Superior and County Court Judges, your Lordships would have found no reference at all to the appointment of any Judges in the B. N. A. Act. The legislative power to constitute the Courts, to effect their organization, would have implied the power to make them complete by the appointment of the Judges. But it was because it was intended to assign the power of appointing Judges to another political entity that this particular grant was necessarily specified in the Act. To the extent to which appointing powers, necessary to complete the legislative Acts of the Local Legislature, were left with the local authority, no express mention was necessary, because they were a part of the whole; they belonged to it; they were a portion of the executive powers, complementary and essential to the completion of the legislative powers expressly granted; and according to the general scheme of the Act they are therefore not specified, but implied.

Thus in *Wilson v. McGuire*, 2 Cart., page 671, the judgment of your Lordship the Chief Justice points out that

The Legislature of Ontario has complete power over the Division Courts as to their existence, constitution, rearrangement,

and so on.

In the case of the Superior and County Courts the general Government interposed in the power of appointing the Judges.

The County Judges appointed by the Crown have presided over these Division Courts from their establishment.

The Provincial Legislature, since its establishment, has made many changes in these Courts, enlarging their jurisdiction, and making provisions for enforcing their progress over property and persons outside their ordinary boundaries, but have never interfered with the principle of having them presided over by a County Judge, and, as already noticed, even before Confederation the Judge of another County could act in the case of illness or unavoidable absence.

As they have power to abolish such Courts and to establish others for the disposal of the like or other classes of business, I assume their right to appoint officers to preside over them

confirming the view I have just ventured to state that the right to appoint, the right to perform the executive act, or to vest in another the performance of the executive act of appointment of a Judge, is involved or implied in the legislative power of creating a Court.

Then, when this grouping Act was passed, regarding it solely in its bearing on Division Courts I can see no valid objection to the Legislature directing that the Judges, senior and junior, of the grouped Counties, should arrange among themselves that the duty of presiding should be taken rotation.

Mercer v. Attorney-General for Ontario. I wish to refer your Lordships, for the sake of brevity, to the argument which was reported in 5 S. C. Reports, page 577. The position which, as one of the Counsel in the cause, I then took as to the condition of the different Provinces, and the construction of the Confederation Act, is in part germane to this argument.

I refer also, at page 598, to some observations of Mr. Bethune, *arguendo*; and at page 603, to cer-

tain arguments of M. Loranger as Counsel for Quebec.

In the same case I refer to 3rd Cartwright, page 26:—Ritchie, C. J., after citing the Acts, Proclamations, etc., points out that the provisions which were plainly made with reference to certain proclamations and powers, and so on, as to Ontario and Quebec, were not necessary for the other Provinces.

As the Executive Governments of Nova Scotia and New Brunswick were continued these provisions were not necessary as to those Provinces, but these various enactments and the continuance of the executive Governments of Nova Scotia and New Brunswick very clearly show that the Provincial executive power and authority was to be precisely the same after as before Confederation; that whatever executive powers could be exercised or administrative acts done in relation to the Government of the Provinces respectively by the Lieutenant-Governor of a Province before Confederation can be exercised or done by Lieutenant-Governors since Confederation, subject, of course, to the provisions of the Act, as it is said, in reference to Nova Scotia and New Brunswick, and is expressed in reference to Ontario and Quebec, "as far as the same are capable of being exercised after the Union."

That is to say, that the executive Government of the Province as exercised by the Lieutenant-Governors and executive Councils, until altered by the respective Legislatures, continues as before Confederation, except so far as the executive powers of the Governor-General over the Dominion of Canada may interfere.

Therefore, when it is claimed that a Lieutenant-Governor and Council are not competent to deal with a matter or do an executive administrative Act that was within their competency before Confederation, the burthen is cast on those putting forward such a claim to shew clearly from the B. N. A. Act that by express language or by necessary implication the local governments have been denuded of that authority, and the power has been placed in the executive authority of the Dominion. Special pains appear to me to have been taken to preserve the autonomy of the Provinces, so far as it could be consistently with the Federal Union.

To say then that the Lieutenant-Governors, because appointed by the Governor-General, do not in any sense represent the Queen in the Government of their Provinces, is, in my opinion, a fallacy; they represent the Queen as Lieutenant-Governors did before Confederation, in the performance of all executive or administrative Acts now left to be performed by Lieutenant-Governors in the Provinces in the name of the Queen, and this is notably made apparent in section 82, which enacts that "the Lieutenant-Governor of Ontario and Quebec shall from time to time, in the Queen's name, by instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province," and with reference to which matter, nothing is said with respect to Nova Scotia and New Brunswick, the reason for which is obvious, the executive authority at Confederation continuing to exist, the Lieutenant-Governors of those Provinces were clothed with authority to represent the Queen, and in Her name called together the Legislatures—and also in the section retaining the use of the Great Seals, for the Great Seal is never attached to a document except to authenticate an Act done in the Queen's name, such as proclamations summoning the Legislatures, commissions appointing the high executive officers of the Province, grants of public lands, which grants are always issued in the name of the Queen, under the Provincial Great Seals.

These being the direct enactments in the matter of the executive powers of the Dominion and the Provinces respectively, it is well to look at the distribution of legislative powers; and as to all matters coming within the classes of subjects enumerated over which the exclusive legislative authority of the Parliament of Canada is declared to extend, there is not to be found one word expressing or implying the right to interfere with Provincial executive authority, or property, or its incidents, whereas, in the enumeration of the matters coming within the classes of subjects in relation to which the Provincial Legislatures may exclusively make laws, we find number 1:—The amendment from time to time, notwithstanding anything in this Act, of the constitution of the Province, except as regards the office of Lieutenant-Governor, and from this I think a fair inference may be drawn, that as the Lieutenant-Governor under certain circumstances and in certain matters having reference to Provincial administration represents the Crown, the Provincial Legislatures are not permitted to interfere with this office.

At page 33 the same learned Judge says:—

It is at the same time equally the duty of all Courts, especially this appellate tribunal, to recognize and preserve to the executive Governments and local Legislatures of the Provinces their just rights, whether political or proprietary, and not to permit the Provinces to be deprived of their local and territorial rights on the plea that Lieutenant-Governors in no sense represent the Crown, and therefore all seignorial or prerogative rights, or rights enforceable as seignorial or prerogative rights, of necessity belong to the Dominion.

While I do not think it can be for a moment contended that the Lieutenant-Governors under Confederation represent the Crown as the Lieutenant-Governors before Confederation did, I think it must be conceded that Lieutenant-Governors, since Confederation, do represent the Crown, though doubtless in a modified manner.

In my opinion it was not intended by the B. N. A. Act to deprive the Provinces of the executive and legislative control over the public property of the Province, or the incidents of such property, or other matters of a purely local nature, except such as are specifically taken from them, and that within the scope of the executive and legislative powers confided to the Dominion and Provinces respectively, they are separate and independent, neither having any right to interfere with or intrude on those of the other.

HAGARTY, C. J.—Do you say that the Court was unanimous?

COUNSEL—Oh, no, my Lord. That happened in the Supreme Court, which is not uncommon in constitutional cases; the Court was divided; the Supreme Court held, by a majority, adversely to the right of the Provinces; but the Judicial Committee agreed in the conclusion of the Chief Justice.

In 3rd Cart., is the judgment of the Judicial Committee. Page 778:—

It appears, however, to their Lordships to be a fallacy to assume that because the word "Royalties" in this context would not be inofficious or insensible, if it were regarded as having reference to mines and minerals, it ought, therefore, to be limited to those subjects. They see no reason why it should not have its primary and appropriate sense, as to (at all events) all the subjects with which it is here found associated, lands as well as mines and minerals; even as to mines and minerals it here necessarily signifies rights belonging to the Crown *jure coronæ*. The general subject of the whole section is of a high political nature; it is the attribution of Royal territorial rights, for purposes of revenue and Government, to the Provinces in which they are situate, or arise. It is a sound maxim of law, that every word ought, *prima facie*, to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context.

The judgment points out the meaning of "Royalties," "regalities," "jura regalia," "jura regia," and the argument in a case which their Lordships consider to correctly state the law. They hold in the end

that the larger interpretation, which they regard as in itself the more proper and natural, also seems to be that most consistent with the nature and general objects of this particular enactment, which certainly includes all other territorial revenues of the Crown arising within the respective Provinces.

Then I refer to the case of *The Queen v. St. Catharines Milling Co.*, in this Court, 13 App. Reports; and the judgment of your Lordship, Mr. Justice Burton, at page 164, which adverts, first to the case of *Lenoir v. Ritchie*, and points out that the case in hand is not on all fours with that; and then discusses at some length the powers of the Provinces; and the method of interpretation of the B. N. A. Act is thus defined, it is "to be interpreted in a broad, liberal, and quasi political sense."

The judgment of Patterson, J. is also material.

Then I refer to the Privy Council report of the same case, 14 App. Ca. 46, page 55, which points out what was done in 1840 with reference to the produce of the territorial and other revenues at the disposal of the Crown, placed in the Consolidated Fund of the new Province then created; and adds:—

There was no transfer to the Province of any legal estate in the Crown Lands, which continued to be vested in the

Sovereign; but all moneys realized by sales or in any other manner became the property of the Province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the Province, the title still remaining in the Crown. That continued to be the right of the Province until the passing of the British North America Act, 1867.

The Act of 1867, which created the Federal Government, repealed the Act of 1840, and restored the Upper and Lower Canadas to the condition of separate Provinces.

There is the phrase which the Privy Council itself uses, after listening to the argument which was addressed to them as to the meaning of the Confederation Act; "*Restored the Upper and Lower Canadas,*" under the title of Ontario and Quebec.

In construing these enactments, it must always be kept in view, that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, have been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its Legislature, the land itself being vested in the Crown.

There, your Lordships see the ground distinctly taken by the Privy Council; that the land was originally vested in the Crown, and always continued to be vested in the Crown; that the title was not transferred to the Province, but always remained in Her Majesty; that the beneficial enjoyment of the land and its proceeds became the property of the Province; that the Province became entitled to legislate in reference to the land. There then is Crown land, vested in Her Majesty; and, because the beneficial enjoyment of it becomes the property of the Province, it is entitled to legislate; and that in such a way as to divest the title of the Crown; which the Ontario Legislature did, as I said yesterday, by an Act passed very early after Confederation, making the Commissioner of Crown lands the person entitled to deal with the land.

The enactments of sec. 109, are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the Union were vested in the Crown.

So strongly did the Court hold that the Crown subsisted in Ontario in reference to lands in the Province for Provincial purposes—that there was a Crown in right of Ontario, as a Crown in right of the Dominion—that they construed the instrument which had been prepared by the Government of Canada between it and the Indians concerned, a document ceding and releasing

the territory in dispute, in order that it might be opened up for settlement immigration, and such other purposes as to Her Majesty might seem fit, to the Government of the Dominion of Canada, for the Queen and Her successors forever,

as ceding it to the Queen in the interest and right of the Province of Ontario; not to the Queen in the interest and right of the Dominion.

HAGARTY, C. J.—But was not that the time the territory was supposed to belong to the Dominion?

COUNSEL—Which would make the argument, *a fortiori*, stronger for the other construction. It was disputed. At the time that document was prepared it was unknown on which side the right was; but the stronger the belief that the property was within the territorial limits of the Dominion, the clearer would be the argument in favor of the surrender being a grant to the Crown in right of the Dominion.

It was argued that a cession of these lands was in effect a conveyance to the Dominion Government of the whole rights of the Indians, with consent of the Crown. That is not the natural import of the language of the Treaty, which purports to be from beginning to end a transaction between the Indians and the Crown; and the surrender is in substance made to the Crown. Even if its language had been more favorable to the argument of the Dominion upon this point, it is abundantly clear that the Commissioners who represented Her Majesty, whilst they had full authority to accept a surrender to the Crown, had neither authority or power to take away from Ontario the interest which had been assigned to that Province by the Imperial Statute of 1867.

And they say that

the Treaty leaves the Indians no right whatever to the timber growing upon the lands which they gave up, which is now fully vested in the Crown, all revenues derivable from the sale of such portions of it as are situate within the boundaries of Ontario being the property of that Province.

Thus it is made perfectly clear that the Provincial Legislature has the right to interfere by legislation to divest the Crown of Crown property held in the name of the Crown; and this because it has full legislative powers over, and the beneficial interest in that property.

Now, I do not intend to discuss here the passages to which my learned friend alluded in the reasons given by certain of the Judges in the case of *Lenoir v. Ritchie*. Suffice it to say that, as my friend conceded, there was no decision which in this case concludes the Court; and to add to that observation, that these *dicta*, being *obiter*, are also *dicta* which have special reference to another kind of prerogative; which, itself, as I have stated in the Court below, it is intended very shortly to bring directly under the discussion of the tribunals,—and were based on an argument into which I am not now going to enter, that the position of Queen's Counsel is not an office at all, but a title of dignity or honor; that the Crown is *fons honoris*; and that no right or power exists, or can be by the Legislature conferred upon the Lieutenant-Governor to grant that dignity or honor. I may point out, in the course of my argument, positions which have been taken as to the legislative right, even in that respect; but, as I have said, I have no desire to ask your Lordships to indicate at this time any opinion with reference to the particular question of Queen's Counsel, because that subject is about to come expressly before the Court; when the distinctions which are suggested, and the special grounds which are contended to be applicable to the exercise of legislative or executive power as to that office can be more fully discussed and more accurately appreciated.

Now, I submit that the general result is that the Provincial Legislature is, within its domain, sovereign. Strange to say, I shall shew your Lordships presently that Mr. Dicey himself uses that very word with reference to Colonial Legislatures; though in other parts of his work strongly combating the view that even a Legislature such as that of France or Belgium can be called a sovereign Legislature. The word is susceptible, therefore, according to his view, of diverse interpretations; and is capable of being both applied and rejected with reference to the same constitution.

I submit that it is as my learned friend has put it; the Provinces, within their domain, practically approach nearest of all to the position of independent States; conditioned by two elements, one as to their own law making power, which is subject to the exercise of the right of disallowance, and the other as to Imperial legislation, in which respect they are technically exposed, like all other

colonies of Britain, to the existing power—though it be practically less and less dreamed of as being an actual and practical power—the existing power of the Parliament of the United Kingdom to pass legislation binding their interests, or interfering with their views, or even repealing the Charters of their liberties. Subject to these two incidents the Provinces may be taken to approach as nearly as possible, with reference to those subject matters on which they possess any legislative power, the position of independent States.

Now, the legislative and executive authorities are, and must be, co-extensive and complementary; it is essential to efficiency that the Legislature should be able to make, and it does in fact possess express and implied powers to make the Executive efficient for the discharge of all administrative duties; to vest in the Executive many of those functions which the Legislature might, if it pleased, itself perform, but which may be discharged, according to our general notions of government, and of the country's good, more fitly by executive action, than by legislative vote; as for example, appointments to office; and, as I contend, remissions of sentence. It is obvious that a sovereign Legislature must have sovereign power. It is clear here that the Executive is itself a part of the Legislature. It is needful that the Legislature should possess all the essential elements of such a political institution as a Province of Canada; that no other power should be able to disappoint its action, or in effect to nullify or impair its laws, by altering or abrogating decisions and steps taken under those laws, and which are essential to give those laws their force. If you decide that there rests, outside of that body of the people which is permitted to make laws, enforceable by such sanctions as within very wide limitations it may chose to adopt—if you decide, I say, that there rests in some other community a power to determine when, how, or by whom those sanctions shall be modified or waived; then you determine that they have in this particular less than that condition of independence, less than that condition of efficiency, less than that condition of completeness in their political organization which was intended by, and which is needed for the working of the Constitution.

My observation applies to all such prerogative powers as belong or are germane to any subjects within the legislative competence of the Province; not to one more than another; not to one less than another. There is no doubt whatever that any prerogative power can be moulded by the Imperial Parliament; and to the extent to which prerogative powers are cognate to, or affect those elements of government and of legislation which are vested in the sole and exclusive power of this particular portion of the British people, to that extent the power of regulating, the power of abolishing, the power of moulding the prerogative, also inheres in this same portion of the people.

Before turning to some few further observations on the specialties with reference to the prerogative of pardon, I wish to advert very briefly to one or two of the points raised yesterday upon which I have not yet touched.

One of my learned friend's suggestions was that the Act gave in reference to prerogative only the statutory powers. Those it gives expressly, just because they were statutory. It was just because such powers as had been expressly vested in the Executive by statute might not be held to vest by implication in the Executive of the Province under the new organization, that express statutory provision was made indicating that all, even those powers which had been given to the head of the Executive by statute, should so vest. But, instead of that being an argument against the transfer or vesting of the ordinary prerogative powers, impliedly belonging to and customarily exercised, independent of any statutory grant, by the Executive, it is an argument the other way. While the general grant of legislative power involved the right to create and vest in appropriate officers all proper executive power, the general grant of executive power involved the grant of all powers which had customarily and impliedly passed as part of the executive power. These then it was not necessary to grant expressly. They were implied. Those therefore that were granted expressly were not all. They were additional. And so, at another part of my learned friend's argument he almost seemed to agree; because he said that the Lieutenant-Governors had, under the B. N. A. Act, all such powers as were necessary to carry out the authorized legislation of the Province. I largely agree with him. They have, either under the actual operation of, or through legislation authorized by the Act, all such powers. But then if the Legislature of the Province thinks that any law already passed, the execution of which would involve action by the Executive, is a bad law, they have the right to repeal that law; and on the repeal of that law, the Executive power of the Lieutenant-Governor will be *pro tanto* diminished; he can no longer operate upon that subject matter, because the Legislature has abolished it; therefore it can be administered no longer; and thus the powers of the Executive are lessened. So also they may be increased. There is no consistent, there is no feasible interpretation of the Act, which shall refuse to the Legislature the same power of moulding the prerogative, of giving additional statutory prerogatives, and of diminishing existing express or implied prerogatives, as the Imperial Parliament has with reference to the prerogative of the Sovereign to-day; always observing the limitations that it is of course such portion only of the prerogative power as is germane to, as belongs to, as is convenient in order to form and complete the total mass of power, executive and legislative, administrative and parliamentary, that is placed under legislative control in the Province; and that the power of amending the Constitution as to the office of Lieutenant-Governor is withheld.

Then, my learned friend said that this which has been done here may be done, not this way, but in some other and roundabout way. He did not define exactly what the circuit was, by what process the Legislature might do the thing which he says they can do in some other way, but cannot do in this way; but I take note of that acknowledgement. I understand that the view of my learned friend is that it can be done by creating in the same Act which gives power to impose the sentence, some power to remit or modify it. The argument is that the power to remit may be set up as part of the provisions for punishment, but that it cannot be done by a distinct Act. That is to say, that the Legislature, if it passes an Act creating a proper prohibition, providing for the imposition, by a proper authority, of a particular maximum sentence, and at the same time providing that all should be subject to some modification of the sentence imposed, to be made under certain circumstances, after certain investigations, or at

the discretion of some defined authority—will be acting within its right; but that the Legislature, after having passed its prohibitory law, and prescribed its sentence, cannot by a separate subsequent Act provide for that remission, or commutation, which it could have arranged as part of the Act creating the prohibition and prescribing the sentence. I must say I cannot understand the force of that view. It seems to minimize the power of the Legislature in an extraordinary way, to suggest that, while they may, if they choose, repeal all their laws, re-enact them with certain conditions, or subject to certain modifications, and so produce this result, they cannot do it in the plain, simple, and direct way. I submit that is by no means the spirit in which the legislative powers of the Province are to be construed. On the contrary, the recognized spirit of interpretation is just the opposite.

My learned friend acknowledged fairly that, in the correspondence and discussions which have from time to time taken place, in the first place, nothing occurred which should bind the Court, and, in the second place, no distinction was attempted to be drawn, such as is now brought forward, between the two subjects of Provincial offences, and Canadian Criminal Law. On the other hand, I think the fair inference to be drawn from all this correspondence, as I shall shew your Lordships very plainly in respect to some of the later passages, is that what was exclusively present to the minds of those engaged in the discussions was Canadian Criminal Law. Although the language used may be large, yet it was Canadian Criminal Law, and Pardons for crimes under Canadian Criminal Law, which alone were really in debate.

Then my learned friend acknowledged that by a report of the Law Magazine of Quebec it appeared that the Local Goverment there had been, from time to time or habitually, exercising some power of commutation or remission; but he said that he thought it had been generally acquiesced in here that there was no such power. I am not instructed to make any such admission; on the contrary I believe that instances can be produced, perhaps rare, but instances can be produced in Ontario in which similar action has been taken, as was taken in Quebec. But, as my learned friend frankly agreed, neither action nor inaction can affect the decision of this question, which comes free from anything that could hamper the judgment of the Court in a judicial decision now for the first time invoked.

My learned friend then said that in England the notion that pardon is a high prerogative is shown to be still preserved, because its exercise is still kept vested in one person, the Home Secretary. I do not think that observation is of force. The Home Secretary is the appropriate responsible officer. It is clear that, in a country of moderate territorial dimensions, of very easy and rapid communication by mail and telegraph between its different parts, ruled by one set of laws, where neither distance nor circumstances create difficulty in disposing, almost at a moment's notice, of such questions, it is clear that there is no ground of convenience for a distribution of this prerogative, for the creation of divers officers to be entrusted with this power, to be exercised in different parts of England. It is clear on the contrary that, for laws which are passed by and which affect the whole body of the English people, for the administration of which laws responsible officers are to be appointed, there are conveniences in unity of administration. It would be inconvenient that there should be one person with one notion as to remissions for Wales, another person with perhaps another notion as to remissions for the south, and yet another for the north of England; and that the executive action of each, in a matter in which discretion certainly plays a great part, should be criticized not merely as the exercise of this prerogative is now criticized, but criticized with the additional embarrassment produced by contrasts between the action of the different officers. Unity in that respect is also important, because you have unity in all other respects; you have one political entity, one set of laws affecting all, and you have, and ought to have the responsibility of one man for the exercise of one prerogative to the people who make and who live under the laws in respect of which that prerogative is to be exercised. As for Ireland, though the laws are said to be the same, yet their administration, including that of the prerogative of pardon, is vested not in the Home but in the Irish office. With us all these arguments work just the other way.

Then my learned friend, Mr. Lefroy, referred to Mr. Dicey as to the nature of the prerogative; and while I acknowledge that he has made the observations quoted by my learned friend, yet I do not need to go beyond Mr. Dicey's own work for the establishment of the fundamental principle which I invite your Lordships to lay down, and by which the decision of this case is, as I submit, governed. And perhaps, as my learned friends lay so great stress on Mr. Dicey, it may be well to quote him more fully and exclusively than else I might be disposed to do.

Without touching at this moment upon his comments upon Blackstone's view, I wish to refer to a few pages in which material observations are made

I refer to pages 59 and 60:—

> Doctrines have at times been maintained which went very near to denying the right of Parliament to touch the prerogative;

and he points out that at this day (no matter how great the powers, as for example those connected with the right of making treaties, and the right of making war and declaring peace, which he specifies as being left, by the law, in the hands of the Crown, and as being exercised, in fact, by the executive Government)

> No modern lawyer would maintain that these powers, or any other branch of Royal authority, cannot be regulated or abolished by Act of Parliament.

That is the present constitutional and legal doctrine upon even the most precious and the highest prerogatives.

Then, with reference to his distinction between the constitution of a country like that of Canada, and the British constitution, we have to deal, not with the legal view which at one stage and mainly he expounds, but with the political view which the Court here, as the interpreter of a political constitution, has necessarily to adopt. I refer to page 66, in which he points out that the word "Sovereignty" is sometimes employed in a political, rather than in a strictly legal sense.

> That body is "politically" sovereign or supreme in a State the will of which is ultimately obeyed by the citizens of the

State. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and Lords, or perhaps in strict accuracy independently of the King and the Peers, the body in which sovereign power is vested. For, as things now stand, the will of the electorate and certainly of the electorate in combination with the Lords and the Crown is sure ultimately to prevail on all subjects to be determined by the British Government. The matter indeed may be carried a little further, and we may assert that the arrangements of the constitution are now such as to ensure that the will of the electors shall, by regular and constitutional means, always in the end assert itself as the predominant influence in the country.

Then, at page 77 he indicates his view of the system of representative Government, and its effect.

All that it is here necessary to insist on is that the essential property of representative Government is to produce coincidence between the wishes of the Sovereign and the wishes of the subjects; to make, in short, the two limitations on the exercise of Sovereignty absolutely co-incident. This, which is true in its measure of all real representative Government, applies with special truth to the English House of Commons.

At pages 83 and 84 he refers to the possibility of framing the law of the English constitution in writing, enacted in the form of a constitutional code, and speaks of the Belgian constitution in the terms to which I referred yesterday.

Page 103 :—

The Colonial Legislatures, in short, are within their own spheres copies of the Imperial Parliament. They are within their own spheres sovereign bodies; but their freedom of action is controlled by their subordination to the Parliament of Great Britain.

At page 108 he discusses

The nature and extent of the control exerted by Great Britain over Colonial legislation,

and indicates that

the tendency, in the first place, of the Imperial Government is, as a matter of policy, to interfere less and less with the action of the Colonies, whether in the way of law-making or otherwise.

Then at page 131, he gives his definition of a Federal State :—

A Federal State is a political contrivance intended to reconcile national unity and power with the maintenance of "State rights." The end aimed at fixes the essential character of Federalism. For the method by which Federalism attempts to reconcile the apparently inconsistent claims of national sovereignty and of State sovereignty consists of the formation of a constitution under which the ordinary powers of Sovereignty are elaborately divided between the common or national Government and the separate States.

The details of this division vary under every different Federal constitution, but the general principle on which it should rest is obvious. Whatever concerns the nation as a whole should be placed under the control of the national Government. All matters which are not primarily of common interest should remain in the hands of the several States.

At page 160 he refers to a most important element of Federalism :—

Federalism, lastly, means legalism—the predominance of the judiciary in the constitution—the prevalence of a spirit of legality among the people.

That in a confederation like the United States the Courts become the pivot on which the constitutional arrangements of the country turn is obvious. Sovereignty, [illegible] lodged in a body which rarely exerts its authority, and has (so to speak) only a potential existence; no Legislature throughout the land is more than a subordinate law making body capable in strictness of enacting nothing but by-laws; the powers of the executive are again limited by the constitution; the interpreters of the constitution are the Judges. The bench, therefore, can and must determine the limits to the authority both of the Government and of the Legislature; their decision is without appeal; the consequence follows that the Bench of Judges is not only the guardian but also the master of the constitution. Nothing puts in a stronger light the inevitable connection between Federalism and the prominent position of the judicial body than the history of modern Switzerland, which history he sketches. Then he comments upon its records.

I have read the last passage, because it seems to me that we must realize, that the discussion of this case forces us to realize, the peculiar character of that jurisdiction, which the Court is now called upon to exert. We must realize the view that it is not by an appeal to laws only, it is not by an appeal to what is set down in codes, it is not by an appeal to judicial decisions, it is not by an appeal to that portion of our constitution which is embodied in formal and statute law, but it is by a reference to the whole constitution, to the conventions of the constitution, to the principles of the constitution, to those political elements which I am endeavoring to make clear, it is thus only that we can place ourselves in a position to determine the true meaning of the constitution, and the range of powers of the one, and of the other, of the several law-making bodies, or political organizations which exist under that constitution. This is the reason why this argument proceeds in ways unaccustomed to the Courts; it is on this account that I am obliged to ask your Lordships to look into the principle of the British Constitution, and to settle the interpretation of that phrase as applied to Canada and the Provinces in the Act, and therefore to enter into a domain which is more ordinarily that of the statesman and the politician than of the lawyer, the jurist, or the Judge. But still so must it be. Our constitution is not wholly written; it is one which incorporates, by a phrase or two, that vast aggregate of unwritten conventions, codes, ethics, views, understandings, customs which are embodied in the phrase, "The British Constitution"; and these we must consider; the essential principle we must ascertain; by that essential principle we must be governed, when we come to settle this question of the extent of the executive and of the legislative powers which are vested in any one of the political bodies existent under the Act.

Then at page 329 Dicey speaks of "The responsibility of Ministers," and points out how much it means, and the extent to which it affects the prerogative of the Crown

At page 347 he speaks of "The discretionary powers of the Government," and shows that the doing of numerous most important acts, as for instance, the dissolution and convocation of Parliament, the making of peace or war, the creating of Peers, the dismissal of a Minister from office, or the appointment of his successor, lies, legally, at any rate, within the discretion of the Crown.

They belong, therefore, to the discretionary authority of the Government. This authority may no doubt originate in Parliamentary enactments, and in a limited number of cases actually does so originate.

And he gives the case of the Naturalization Act.

With the exercise, however, of such discretion as is conferred on the Crown or its servants by Parliamentary enactments we need hardly concern ourselves. The mode in which such discretion is to be exercised is (or may be) more or less clearly defined by the Act itself, and is often so closely limited as in reality to become the subject of legal decision, and thus pass from the domain of constitutional morality into that of law properly so called. The discretionary authority of the Crown originates generally, not in Act of Parliament, but in the "prerogative," a term which has caused more perplexity to students than any other expression referring to the constitution. The "prerogative" appears to be both historically, and as a matter of actual fact, nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown. The King was originally in truth what he still is in name, "the

sovereign," or if not strictly the "sovereign," in the sense in which jurists use that word, at any rate by far the most powerful part of the sovereign power.

He refers to the trial, in 1791, of Mr. Reeves, under the order of the House of Commons and states :—

The power of the Crown was anterior to that of the House of Commons. From the time of the Norman Conquest down to the Revolution of 1688, the Crown possessed in reality many of the attributes of Sovereignty. The prerogative is the name for the remaining portion of the Crown's original authority, and is therefore, as already pointed out, the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the Queen herself or by Her Ministers. Every Act which the executive Government can lawfully do without the authority of an Act of Parliament is done in virtue of this prerogative. If, therefore, we omit from view (as we conveniently may do) powers conferred on the Crown or its servants by Parliamentary enactments, as for example under an alien Act, we may use the term, "prerogative" as equivalent to the discretionary authority of the Executive, and then lay down that the conventions of the constitution are in the main precepts for determining the mode and spirit in which the prerogative is to be exercised, or what is really the same thing, for fixing the manner in which any transaction which can legally be done in virtue of the Royal prerogative (such as the making of war or the declaration of peace) ought to be carried out. This statement holds good, it should be noted, of all the discretionary powers exercised by the Executive, otherwise than under statutory authority; it applies to Acts really done by the Queen herself in accordance with Her personal wishes, to transactions (which are of more frequent occurrence than modern constitutionalists are disposed to admit) in which both the Queen and Her Ministers take a real part, and also to that large and constantly increasing number of proceedings which, though carried out in the Queen's name, are in truth wholly acts of the Ministry. The conventions of the constitution are in short, rules intended to regulate the exercise of the whole of the remaining discretionary powers of the Crown, whether these powers are exercised by the Queen herself or by the Ministry.

Then he gives a number of instances, and proceeds :—

The result follows, that the conventions of the constitution looked at as a whole are customs, or understandings as to the mode in which the several members of the sovereign legislative body, which, as you will remember, is the "King in Parliament," should each exercise their discretionary authority, whether it be termed the prerogative of the Crown or the privileges of Parliament. Since, however, by far the most numerous and important of our constitutional understandings refer at bottom to the exercise of the prerogative, it will conduce to brevity and clearness if you treat the conventions of the constitution, as I shall do for the rest of this lecture, as rules or customs determining the mode in which the discretionary power of the Executive, or in technical language the prerogative, ought (*i.e.*, is expected by the nation) to be employed.

Having ascertained that the conventions of the constitution are (in the main), rules for determining the exercise of the prerogative, we may carry our analysis of their character a step further. They have all one ultimate object. Their end is to secure that Parliament or the Cabinet which is indirectly appointed by Parliament, shall in the long run give effect to the will of that power which in modern England is the true political sovereign of the State—the majority of the electors, or (to use popular though not quite accurate language) the nation. At this point comes into view the full importance of the distinction insisted upon in a former lecture between "legal" sovereignty and "political" sovereignty.

He points out the legal sovereignty of Parliament and goes on :—

But, if Parliament be in the eye of the law a supreme Legislature, the essence of representative Government is, that the Legislature should represent or give effect to the will of the political sovereign, I mean of the electoral body, or of the nation.

At page 355 :—

The conventions of the constitution now consist of customs which (whatever their historical origin) are at the present day maintained for the sake of ensuring the supremacy of the House of Commons, and ultimately, through the elective House of Commons, of the nation. Our modern code of constitutional morality secures, though in a round-about way, what is called abroad the "sovereignty of the people." That this is so becomes apparent if we examine into the effect of one or two among the leading articles of this code. The rule that the powers of the Crown must be exercised through Ministers who are members of one or other House of Parliament and who command the confidence of the House of Commons really means that the elective portion of the Legislature in effect, though by an indirect process, appoints the executive Government; and, further, that the Crown, or the Ministry, must ultimately carry out, or at any rate not contravene, the wishes of the House of Commons. But as the process of representation is nothing else than a mode by which the will of the representative body or House of Commons is made to coincide with the will of the nation, it follows that a rule which gives the appointment and control of the Government mainly to the House of Commons is at bottom a rule which gives the election and ultimate control of the executive to the nation.

At page 366 :—

Neither the Crown nor any servant of the Crown ever refuses obedience to the grand principle –

Do you want the principle of the British constitution? Here is where I think Mr. Dicey states it :—

the grand principle which, as we have seen, underlies all the conventional precepts of the constitution, namely, that government must be carried on in accordance with the will of the House of Commons and ultimately with the will of the nation as expressed through that House. This principle is not a law; it is not to be found in the statute book; nor is it a maxim of common law; it will not be enforced by any ordinary judicial body. Why then has the principle itself, as also have certain conventions or understandings which are closely connected with it, the force of law?

And he proceeds to state why it has the force of law ; but there is the principle.

At page 381 he discusses a very interesting question, of which marked examples are to be found in late days, some in England, and some in Canada, both in Provincial and in Dominion affairs :—

What is the reason why no one can describe with precision the limits to the influence on the conduct of public affairs which may rightly be exercised by the reigning monarch, and how does it happen that George the Third and even George the Fourth each made his personal will or caprice tell on the policy of the nation in a very different way and degree from that in which Queen Victoria has ever attempted to exercise personal influence over matters of state?

The answer in general terms to these and the like enquiries is, that the one essential principle of the constitution is obedience by all persons to the deliberately expressed will of the House of Commons in the first instance, and ultimately to the will of the nation as expressed through Parliament. The conventional code of political morality is, as already pointed out, merely a body of maxims meant to secure respect for this principle.

Then he goes on to discuss it.

At page 387 he gives a very interesting discussion of what the revelations of political memoirs and the observation of modern public life make clear as to our constitution :—

The first is, that while every Act of State is done in the name of the Crown, the real executive government of England is the Cabinet. The second is, that though the Crown has no real concern in a vast number of the transactions which take place under the Royal name, no one of Queen Victoria's predecessors, nor it may be presumed Queen Victoria herself, has ever acted upon or affected to act upon the maxim originated by Thiers, that "the King reigns but does not govern."

And he proceeds to discuss all that; and he points out that the degree of influence which, *sub rosa*, so to speak, without publicity at any rate, the reigning monarch, under our constitution, may exercise, is a vague, fluctuating, and unknown quantity; partly, I suppose, because it is exercised "under the rose," partly because no man can tell the actual extent to which in any case the

nation wishes that the personal influence of the Sovereign should weigh. But, he points out that in old times personal views much more prevailed; and he cites, as showing the characters and customs of the country, a fictitious incident which pertains to this very prerogative of Pardon:—

In small things as much as in great one can discern a tendency to transfer to the Cabinet powers once actually exercised by the King. The scene between Jeanie Deans and Queen Caroline is a true picture of a scene which might have taken place under George the Second. George the Third's firmness secured the execution of Dr. Dodd. At the present day the right of pardon belongs in fact to the Home Secretary. A modern Jeanie Deans would be referred to the Home Office; the question whether a popular preacher should pay the penalty of his crime would now, with no great advantage to the country, be answered by the Cabinet.

Then at page 390 he asks:—

What, again, is the real effect produced by the survival of prerogative powers?

And after pointing out that a very considerable amount of influence is given to, or remains with the monarch, in consequence of acts being done in the name of the monarch, he yet shows that it is far more important to notice the way in which the survival of the prerogative affects the position of the Cabinet.

It leaves in the hands of the Premier and his colleagues, large powers which can be exercised and constantly are exercised free from parliamentary control. This is specially the case in all foreign affairs. Parliament may censure a Minister for misconduct in regard to the foreign policy of the country. But a treaty made by the Crown, or in fact by the Cabinet, is valid without the authority or sanction of Parliament; and it is even open to question whether the treaty making power of the Executive might not in some cases over-ride the law of the land. It is not Parliament, but the Ministry, who direct the diplomacy of the nation.

He refers to the restrictions placed, in the United States, upon the power, and adds:—

The survival of the prerogative, conferring, as it does, wide discretionary authority upon the Cabinet, involves a consequence which constantly escapes attention. It immensely increases the authority of the House of Commons, and ultimately of the constituencies by which that House is returned.

At page 393 he cites the well-known instance in which Mr. Gladstone, after the House of Lords had declined to agree to the legislation which had been carried through the House of Commons with reference to the reorganization of the British army, accomplished his measure, or enforced their assent, through the Royal Warrant abolishing purchase. But, that, of course, was done in the name of the Crown, by the Cabinet.

If government by Parliament is ever transformed into government by the House of Commons, the transformation will, it may be conjectured, be effected by use of the prerogatives of the Crown.

At page 396, again, he speaks of the two guiding principles of the law of the constitution, which he distinguishes from the conventions of the constitution. The first is the sovereignty of Parliament,

which means in effect the gradual transfer of power from the Crown to a body which has come more and more to represent the nation. This curious process, by which the personal authority of the King has been turned into the the Sovereignty of the King in Parliament, has had two effects; it has put an end to the arbitrary powers of the monarch; it has preserved intact and undiminished the supreme authority of the State.

And the second principle is the authority of law.

I have read your Lordships these extracts in order to remove, even by the use of my learned friend's own weapon, the mystery and the magic in which, when one deals with this question of prerogative, it is attempted to enshroud it. If we are to be governed in this Province according to the principle of the British Constitution; if we are here to exercise those powers of representative government, which, I think I have shown from my learned friend's authority, embody the fundamental principle of the British Constitution, as interpreted in our day, then the application of that rule necessarily, I submit, destroys the argument of my learned friend upon prerogative in the general, as well as in the particular point on which the main part of this discussion turns, that of pardon.

As I observed yesterday, had this statute been differently framed, a very grave question might have arisen as to the power of pardon for crimes against Canadian law; because there is, with reference to those departments of legislative power which include this subject, a partition of powers; and it would be necessary to determine on which side of the line the subject fell, in view of that partition. You find the legislative power as to laws affecting property and civil rights, and the enforcement thereof by penal sanctions, given to the local Legislatures; and that as to criminal law given to the central Legislature; you find also that curious and illogical division of "the administration of justice" which was fully discussed in the Queen v. Wason.

If the administration of justice in its entirety, in its largest sense, including the making of the laws which indicate what the justice of the country shall be, as well as the carrying out of those laws, if the whole subject in that largest sense, had been in the hands of one or other of the Legislatures, this power, being a part of it, would have belonged in its entirety to that Legislature There being a partition, and a partition not logically defensible, a question exists, and may, some day perhaps, arise, as to the side on which the power falls with reference to the Canadian Criminal Law. Much is to be said in favor of the Dominion, as the maker of Criminal laws; more, I dare say, in favor of the Dominion, than in favor of the Province; but something also might be said in favor of the Province. We have no concern with that here and now. This Act, as I have shown, has nothing to do with pardon for a Canadian sentence, for a sentence imposed under any Act which might be validly passed by the Canadian Parliament. This Act has to do only with sentences which are passed under the authority, either of a Provincial law, or of legislation which the Provincial Legislature can repeal or amend, and which is, therefore, practically Provincial legislation; in respect of which it may be said that the Province has created, or permitted the continuance of the law creating the offence; in which the Province has created or permitted the continuance of the law creating the penalty; in which the Province can abolish or alter the law creating the offence or the penalty; in which the Province can pass an Act of Grace, or an Act making the law inapplicable to any particular offender, either before or after conviction; in which therefore, as I contend, the Province can legislatively either remit or commute, or authorize the executive remission or commutation of what I may call its own sentence.

This is a local and private matter; it is a matter, *ex concessis*, affecting Provincial, as distin-

guished from Canadian or Imperial interests; it concerns only the sanction, the machinery created by the Province, for securing the efficient observance of laws Provincial in their nature, extending only to the bounds of the Province, affecting only the interests of the Province, made for the people within the Province, made to further the views of the Province, and modified, repealed, changed, enforced, or on occasion remitted, in the interests of the people of the Province. It is that body of Her Majesty's subjects composing the people of Ontario which *ex concessis*, is alone interested in these laws; in their enforcement; and in their remission. That being so, I say, first of all, that it is natural and reasonable that the administration and execution of these laws, in all their respects (including the very important question, whether in any particular case substantial justice demands that a sentence should be enforced to the end, or will be best served by its being remitted or commuted), being exclusively Provincial, should be dealt with exclusively by Provincial authority. Not merely is that reasonable, but it is essential; it is vital; because, if we admit, as we must admit, that laws require sanctions in order that they may become more than forms and shams; if we admit, as we must admit, that that view is not merely well founded, but is expressly recognized by the Constitutional Act; if we admit, as we must admit, that the power of absolving from the sentence of the law may, if improperly or too freely exercised, and will, in proportion to the extent to which it is so exercised, destroy or minish the efficacy of the law, then we must agree that it is not merely convenient, not merely appropriate, not merely natural and reasonable that the power should belong to that political entity which has exclusive control over all other aspects of the law, but that it is vital and essential that it should so belong.

Suppose a state of things in which the opinion of the larger community, represented in the Parliament of Canada, differs from the opinion of that smaller community which is represented in a Provincial Legislature. Take a small Province, take Prince Edward Island; take even a large one, this Province of Ontario; suppose that different notions, rightly or wrongly, prevail at Ottawa, from those prevailing at Charlottetown or Toronto, as to making a particular act an offence at all, or as to punishing that offence to a particular degree. Suppose that the Canadian Parliament, controlling the Canadian Ministry and directing the Government of Canada, is of the opinion that a local law is a bad law, or that a local sentence prescribed under that law is a barbarous sentence; that there should be no such prohibition as the local law makes, nor any such sentence as the local law allows; or that in any particular case the sentence awarded is too severe. Under these conceivable conditions you are asked to abstract from the local authorities the power of practically deciding whether their law shall remain in force, and to give that power to that other and different government of that other and different entity, the Dominion of Canada, whose public opinion differs from the public opinion of the Province concerned. You are therefore asked to interfere in a most serious degree with the principle of local self-government in those subjects which have been assigned as solely and exclusively within the competence of the Provincial Legislature.

Now what is pardon? I think it may be properly stated that pardon is a part of that whole comprised in "the administration of justice." I have said that, in the large sense in which I here use that term, I include legislation with reference to the criminal law; and I therefore include a divided subject. Pardon is an Act which is designed to "make the punishment fit the crime"; that is the substantial ground for the commutation, or remission of a sentence. It is not in the slightest degree the exercise of caprice. It is not to be used according to the quantity or quality of the milk of human kindness, to which one of my learned friends referred, which may be existing in the wielder for the moment of the power. He is bound to consider, and he certainly has oftentimes, as some of us know, a most painful task in weighing the general effect of his decision. What is miscalled mercy to the individual may be gross injustice to the State. He must consider the effect of interference with the sentence of the Court; he must ascertain the general principles upon which he should act; and apply them to each particular case. He must, as far as possible, do those things with reference to the question which comes before him, which the officers of the law would have done, had they, when they acted, been possessed of all the circumstances.

It is just because it is impossible to meet, in advance, all difficulties, to foresee all contingencies, to ensure that all the materials shall be produced before sentence, to avoid all possibility of mistake; and also because it is needful to consider subsequent events which may in practice alter and affect the severity of the sentence, and which may, therefore, call for a nominal alteration in the sentence in order to preserve its real character; it is because and on account of all these considerations, that the power of commutation or remission is set up; and it is on these accounts only that it is at all defensible. It is in truth justice, not mercy. Instances of that truth have been shown in the course of this argument. The case is put of conviction for a crime, I care not whether serious or otherwise, as to which it has been demonstrated, perhaps next day, perhaps after long years, that there was a mistake; perhaps there was perjury, perhaps a mistaken identity; something at any rate has turned up showing plainly that the wrong man had been convicted, that an innocent man had been convicted. What does he get? He gets what is called a "pardon." A "pardon" for the crime of which he has been found innocent! But we perfectly understand that it is *exdebito justitiæ*; that it is the acknowledgement, although in the form of pardon, that the convict was not guilty of the offence; and in late years, in some cases remarkable for their hardship, a slight, though inadequate, compensation has been given for the wrong and suffering inflicted; in such cases as have strongly attracted public attention and excited sufficient commiseration to press action on the Executive, there has been some recognition of the wrong done by the State to the individual, in the way of some poor compensation to those who had been convicted and had suffered in mistake.

Then, you find instances where certain characteristics of the particular offence were not brought to the attention of the Court; or you find the case of ill health subsequent to conviction, which my learned friend put, and which I tried to answer at the moment. Such cases are not all infrequent. Take the case of a man sentenced for five years to the penitentiary; he developes illness; sometimes,

no doubt, illness is shammed; but sometimes it is serious, it is established that confinement in the penitentiary for five years will mean death, or permanent ill health; will kill or wreck the man. That was not the sentence of the law; the law did not intend to inflict permanent loss of health, still less to inflict loss of life, when it gave a sentence of five years. The Judge did not intend these other results. The sentence would not have been awarded had it been foreseen that such a result would take place, and that without remedy. The practical sentence, so altered, has become inappropriate to the offence; and justice requires a remission; and so remission takes place; but all goes under the name of pardon. It is the same kind of procedure as was introduced in early days, in the original Court of Equity, to temper the rigour, as it was called, of the common law; when, in the complication of human affairs, things had so turned out that injustice might be done, which the rigid common law was not capable of recognizing, which in fact it was obliged to enforce. So its rigour was tempered; but it was tempered, not by the measure of "the length of the Chancellor's foot," but on principles settled to be equitable. Such, I submit, are the principles applicable to the exercise of the prerogative of pardon.

Now, Bentham has been referred to; and, of course, Bentham discusses the subject more at large, and sometimes with reference more to what ought to be than to what is. Still, I think, he throws some light upon it. In Vol. I, page 528, in the Appendix, on death punishments, Bentham is dealing with the evil properties of the death punishment, of which he was an inveterate opponent. He enumerates those evil properties, and, as a fourth, he points out that it enhances the evil effects of undue pardon. He speaks of pardon being, as yet, on an unapt footing; and, touching on this inaptitude, he speaks of punishment as everywhere necessary, and the application of it as everywhere a necessary part of judicial procedure.

> But, he says, of that same procedure, power of pardon is moreover a requisite part; power of pardon, that is to say, as above, power of arresting the hands of the Judge, and preventing him from applying punishment, notwithstanding that demand for it, which the conviction of the accused has proved to have taken place. Requisite, I say, —not necessary; for, without the existence of any such power, government might be anywhere carried on. But, in this case, evils of no small magnitude would unavoidably have place—evils, which, by apt application of pardon-power, may be excluded; and, by such application as is actually made of them—are, in a degree more or less considerable, everywhere excluded.

Then he goes on to discuss all the evils produced by the unapt application of the pardon-power; and the restrictions on its exercise; and he speaks of its being in the hands of a functionary, who is the monarch, and discusses difficulties which arose according to the then existing theory of government.

In Vol. 2, page 579, after referring to certain legislation upon the subject of pardon, he goes on to say:—

> What is called mercy, let it be remembered, is in many cases no more than justice; in all cases where the ground of pardon is the persuasion of innocence, entertained either notwithstanding the verdict, or in consequence of evidence brought to light after the verdict.

Then in Vol. 9, page 36:—

> To the vocabulary of tyranny belongs the word mercy. The idea expressed by this word is a sort of appendage to, and antagonizes with, the idea designated by the word justice.
>
> The word justice, as but too commonly employed, matches with the word reserved, as applied to punishment. In this sense, penal justice is exercised by the application of punishment on the occasion on which, and the quantity in which, it is deserved. In this case, if mercy be exercised it is in opposition to, and at the expense of justice; in so far as mercy is exercised, justice is not done. What in this, as in every case, the greatest happiness of the greatest number requires, is—that it, on the occasion in question, the application of the punishment in question would be conducive to that happiness, the punishment should be applied; if not, not; if, in either case, justice is administered, no such thing as mercy is exercised in either case. Under a government which has, for its actual end, the greatest happiness of the greatest number, thus it is that mercy is unknown. Mercy unknown and why? Only because tyranny is unknown. Under a representative democracy—under the government of the Anglo-American United States, for instance, mercy is unknown, or at least might be so with great advantage, and therefore ought to be unknown. Under that government, for a functionary as such to stand up on any occasion, and say, I will, on this occasion, show mercy, would be as much as to say—the power of a tyrant is in my hands but on this occasion I will not exercise it.

So again, he speaks of the quantity of punishment, and the quantity of mercy under a limited monarchy, and refers to the effect, and the method by which it was in his day carried out in England,

> Remission of punishment, yes; for that, there may be good reason on various occasions; but they are all of them capable of being, and all of them ought to be, specified.
>
> In one word, mercy and justice are incompatible. In a government where there is room for mercy, it is because justice is over-ruled by cruelty. As mercy is a subject of praise, the more cruel the tyranny, the greater is the room made for praise.

Then I refer to Blackstone's Commentaries, which, even with due regard to those reserves which Mr. Dicey properly says are to be made in his case, are still fit to be considered in this connection.

Vol. 1, page 239:—

> All offences are theoretically against either the peace of the Sovereign or his Crown and dignity. For though in their consequences they generally seem, except in the case of treason, and a very few others, to be rather offences against the Kingdom than the Crown; yet, as the public, which is an invisible body, has delegated all its powers and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law. And this notion was carried so far in the old Gothic Constitution, wherein the Sovereign was bound by his coronation oath to conserve the peace, that in case of any forcible injury offered to the person of a fellow subject, the offender was accused of a kind of perjury, in having violated the coronation oath: *dicebatur fregisse juramentum regis juratum*. And hence also arises another branch of the prerogative, that of pardoning offences; for it is reasonable that he only who is injured should have the power of forgiving. Of prosecutions and pardons I shall treat more at large hereafter; and only mention them here, in this cursory manner, to shew the constitutional grounds of this power of the Crown, and how regularly connected all the links are in this vast chain of prerogative.

At page 239 the note gives this extract from Hargrave:—

> The prerogative of mercy would seem to be lodged in the Crown, not so much from the fiction that the Sovereign is the injured party, as from the necessity of placing it where it may be promptly and judiciously exercised. The Executive has, therefore, in all countries, naturally and necessarily been invested with the prerogative.

In Vol. 4, page 404, there is a further discussion, in which the monarchical view is repeatedly put forward and very strongly held up; and upon that and Blackstone's general notions of prerogative, I ask your Lordships to consider the views of Mr. Dicey.

Dicey, page 8 :—

Its true defect (Blackstone's Commentaries) is the hopeless confusion both of language and of thought, introduced into the whole subject of constitutional law by Blackstone's habit—common to all the lawyers of his time—of applying old and inapplicable terms to new institutions, and especially of ascribing in words to a modern and constitutional King, the whole and perhaps more than the whole of the powers actually possessed and exercised by William the Conqueror

And then he proceeds to quote Blackstone's general statement on the prerogative, and the language of his criticism is pungent :—

It stands curtailed, but in substance unaltered, in the last edition of Stephen's Commentaries. It has but one fault; the statements it contains are the direct opposite of the truth.

Mr. Dicey, is, perhaps, a little addicted to strong language; but that is what, with great reason, he says here.

The Executive of England is in fact placed in the hands of a committee called the Cabinet. If there be any one person in whose single hand the power of the State is placed, that one person is not the Queen, but the chairman of the committee, known as the Prime Minister. Nor can it be urged that Blackstone's description of the Royal authority was a true account of the powers of the King at the time when Blackstone wrote. George the Third enjoyed far more real authority than has fallen to the share of any of his descendants. But it would be absurd to maintain that the language I have cited painted his true position. The terms used by the Commentator were, when he used them, unreal and known to be so. They have become only a little more unreal during the century and more which has since elapsed.

And he cites again the suggestion that the King is the fountain of justice and conservator of the peace of the Kingdom.

Here we are in the midst of unrealities or of fictions. Neither the Queen nor the Executive have anything to do with erecting Courts of Justice. We should rightly conclude that the whole Cabinet had gone mad if to-morrow's Gazette contained an Order-in-Council not authorized by statute erecting a new Court of Appeal. It is worth while here to note what is the true injury to the study of law produced by the tendency of Blackstone, and other less famous constitutionalists, to adhere to unreal expressions. The evil is not merely or mainly that these expressions exaggerate the power of the Crown. For such conventional exaggeration a reader could make allowance, as easily as we do, for ceremonious terms of respect or of social courtesy. The harm wrought is, that unreal language obscures or conceals the true extent of the powers, both of the Queen and of the government. No one indeed, but a child, fancies that the Queen sits crowned on her throne at Westminster, and in her own person administers justice to her subjects. But the idea entertained by many educated men that an English King or Queen reigns without taking any part in the government of the country, is not less far from the truth than the notion that Queen Victoria ever exercises judicial powers in what are called her Courts. The oddity of the thing is that to most Englishmen the extent of the authority actually exercised by the Crown, and the same remark applies (in a great measure) to the authority exercised by the Prime Minister, and other high officials, is a matter of conjecture ;

and he points out reasons and circumstances.

So you find that the language of Blackstone—where he uses phrases to which my learned friends adverted when they talked of the milk of human kindness, and of this being practically an arbitrary and personal prerogative, comprises obviously phrases which have, for a very long time, had no proper application even to this prerogative. On the contrary, more and more has the exercise of this prerogative by the person who, in the name the Sovereign, does exercise it, the Home Secretary—more and more, I say, has the actual conduct of that official in the exercise of the prerogative come under general, and public, and even parliamentary discussion. In a statement which was made in connection with the Riel case, and which will be handed in to your Lordships, will be found a collection of remarks by numerous Home Secretaries during the last thirty or forty years, showing the method of the exercise of the prerogative, and making it perfectly clear, not merely that as a matter of fact the prerogative is exercised by the Home Secretary, under his responsibility to parliament, but that this fact has at last become public and common knowledge; that everyone understands it; and, we know very well that Mr. Secretary Matthews, the person who at present fills that office, has undergone frequent and severe criticism in respect of his official action. Nobody has any imagination that the Queen, personally, has aught to do with it. The question then which we are now called upon to discuss is not whether this prerogative shall be exercised by the Queen, but whether it shall be exercised by Home Secretary Matthews, or Colonial Secretary Lord Knutsford, or Minister of Justice Sir John Thompson, or by Attorney-General Mowat. The question simply is—it being conceded on all hands that the power is to be exercised by some person who is responsible for its exercise to those concerned in its exercise—who is the fit person? And, who can the fit person be, according to those principles of the British constitution to which I have referred? Who can the fit person be, save that person who is responsible to that portion of the people which is concerned in the matter, to that portion of the people which makes the law, that portion of the people which is governed by the law, that portion of the people which suffers or benefits by the administration of the law, that portion of the people which can retain or dismiss the officer who acts under the law? Else, to the extent to which this prerogative is administered by an officer of some other government, whom the people of the Province do not appoint and cannot dismiss—to that extent they are deprived of the benefit of the great and underlying principle of the British constitution, the power of governing themselves according to their own will.

The definition of pardon given in Anderson's Dictionary of the Law is that it is

an act of grace proceeding from the power entrusted with the execution of the law, which exempts the individual on whom it is bestowed from the punishment the laws inflicts for a crime he has committed. It is in truth a part of the administration of justice. This high prerogative the King is entrusted with on a special confidence that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect as to suit every particular case.

There is an interesting account at page 513, American Law Register, of the power of pardon, directed more particularly to its exercise in the United States, but also giving an account of the English constitutional law as to the power of pardon, and shewing the interventions which had from time to time, and even in early days, taken place by Parliament.

Page 526 :—

It was never doubted that the exercise of the King's prerogative of pardon might be restrained or controlled by Act of Parliament and several Acts have been passed for this purpose. Thus, the transporting and committing any man to prison without the Realm is made by the Habeas Corpus Act, 31 Car. 2, a crime unpardonable by the King.

By 12 and 13 William the Third, C. 2, it is declared that no pardon under the Great Seal shall be pleadable to an impeachment by the Commones in Parliament.

By 2 Edward the Third, Ch. 2, and 14 Edward the Third, Ch. 15, it is provided that no pardon of homicide shall be

granted, only where the King may do it by the oath of his Crown, *i.e.*, where a man slayeth another in his own defence or by misfortune.

Then the Royal power, in this respect, was enlarged by 13 Richard the Second C., 1; so that at so early a time as that of Edward the Third the King's power of pardon was limited; and it became a statutory prerogative in the reign of Richard the Second.

The sixth volume of "The Criminal Law Magazine," page 457, contains an interesting historical statement, including an indication of the powers that existed at one time in the Lords of the Marches, in Wales, and I think also in the district between England and Scotland.

HAGARTY, C. J.—The King sometimes exercised the power with the aid and consent of Parliament?

COUNSEL—Certainly, my Lord. It was a special form of Act of Parliament, but the power was sometimes exercised in that way.

HAGARTY, C. J.—It shews that the Crown shared with the Legislature upon those occasions the pardoning power.

COUNSEL—The Act of Grace is a well-known Parliamentary form of exercising the pardoning power. It has its specialties of procedure; it is not presented or prosecuted in the ordinary way.

Again referring to the old powers of the Lords of the Marches; the power of pardon was by 27 Henry the Eighth, vested solely in the King, in those regions, that is to say, in the Marches, and in Wales. And why? Because in that country as well as in the other parts of the Realm the King was the prosecutor of all offenders against the criminal laws of the Realm, and in His name all actions for fines and penalties were brought. It was perfectly consistent, in theory, that the King should, by means of a pardon, remit any punishment due to the public justice of which he was the embodiment; and any fine or forfeiture, which he would himself otherwise receive.

Hawkins' Pleas of the Crown, chap. 37, p. 529, sec. 1, deals with the case of the Lords Marchers, and other, who had *jura regalia*, rights by ancient grant, or by prescription, and cites the Act, 27, Henry the Eighth, vesting these powers in the Crown.

King v. Parsons, Holt's Reports 519:—

> The power of pardoning all offences is an inseparable incident to the Crown; and it is equally for the good of the people that the King should pardon as that he should punish. The King, by his coronation oath, is to shew mercy as well as to do justice.

Vattel's Law of Nations, book 1, ch. 13, sec. 173:—

> The very nature of Government requires that the executor of the laws should have the power of dispensing with them when this may be done without injury to any person, and in certain particular cases where the welfare of the State requires an exception. Hence the right of granting pardons is one of the attributes of Sovereignty. But, in his whole conduct, in his severity as well as his mercy, the Sovereign ought to have no other object in view than the greater advantage of society. A wise prince knows how to reconcile justice with clemency—the care of the public safety with that pity which is due to the unfortunate.

Maine's Ancient Law, p. 380:—

> The modern administrator of justice has confessedly one of his hardest tasks before him when he undertakes to discriminate between the degrees of criminality which belong to offences falling within the same technical description. It is always easy to say that a man is guilty of manslaughter, larceny, or bigamy, but it is often most difficult to pronounce what extent of moral guilt he has incurred, and consequently what measure of punishment he has deserved. There is hardly any perplexity in casuistry, or in the analysis of motive, which we may not be called upon to confront, if we attempt to settle such a point with precision; and accordingly the law of our day shews an increasing tendency to abstain as much as possible from laying down positive rules on the subject. In France, the jury is left to decide whether the offence which it finds committed has been attended by extenuating circumstances: in England, a nearly unbounded latitude in the selection of punishments is now allowed to the Judge; while all States have in reserve an ultimate remedy for the miscarriages of law in the prerogative of pardon, universally lodged with the Chief Magistrate.

Now, my Lords, I must observe that, with reference to the exercise of this particular prerogative, there are some things which have in past days confused the ideas of the general public mind. The very circumstance, commented upon by Dicey, of the existence of notions widely spread, regarding the Sovereign's personal authority as still subsisting, and touching the personal character of prerogative, has had special weight with regard to this prerogative of so-called "mercy" and "pardon;" and the very name "pardon," the very name "mercy," has served to maintain in the popular mind, longer than in other matters of a cognate character, notions as to the exercise of an individual or personal prerogative of the Crown.

Many other prerogatives are of such a character, and are exercised under such circumstances that they do not strike the popular mind, or impress the general thought so forcibly as is the case in respect of convictions after interesting public trials. The incidents of the cause; the feelings which must always animate the breast of man, moved by the condition of the wretch who is to suffer the great penalty of the law; the dramatic, even tragic, character of the events; the shortness of the interval within which the punishment is to follow the finding of the jury—all these things have made the exercise of this particular prerogative the subject of popular thought and interest, and of popular misconception too, more, perhaps, than the exercise of any other such power. This misconception has been seriously enhanced by the still fresh memory retained of notorious historical instances, in which, under the guise of a constitutional exercise of the prerogative, at times when prerogative notions stood much higher than they stand to-day, the monarch himself has been put forward as the granter or refuser of the prerogative of mercy. You have the instance which the great master of the art of the novelist, the great exhibitor of the thoughts and fancies, habits and customs of the people, to whom reference is made by Dicey, has made familiar by the affecting episode of the journey and appeal of Jeanie Deans. You have the incident in 1715 of the Countess of Nithisdale, and Lady Cairns; growing out of circumstances in which it would be naturally supposed, that for some reasons, the monarch was specially the person concerned, because they had regard to attempts against his power and, no doubt, against his safety. Those ladies appealed personally to their Sovereign for their husbands, then lying under sentence of death. Not metaphorically but literally, Lady Nithisdale laid herself at his feet, clinging to his robes, praying for his mercy. Those tears and entreaties, of course, produced no effect; the decision even then was in other hands. Still, that was what the public saw; it was that by which the public was impressed. So, take the remarkable episode in which James, exhibiting a callousness which outraged common decency, and the ordinary feelings of humanity,

gave an interview to his own nephew, Monmouth, and allowed the unhappy man to kneel, imploring, at his feet; although he was all the time determined to resist the supplications he allowed, and, so far as he was concerned, to consummate the execution.

All these things filled the mind of the public, more or less, with the idea of a continuing personal prerogative of pardon. But that notion, in a Court of Justice, in a parliament, amongst constitutionalists, amongst jurists, is as utterly exploded as the notion of the personal exercise of any other prerogative that can be named. While there may be some specialties perhaps even yet attending the exercise of such prerogatives, for example, as that of dissolution, or that of the choice of a first minister, or the ennobling of a retiring first minister; yet as to the vast mass of prerogative powers it is common knowledge to-day, and it is becoming common knowledge to-day with reference to the exercise of the prerogative of mercy, that the personal wishes, the personal views, the personal influence, or the initiative of the Sovereign have no more to do with the exercise of these prerogative acts than they have to do with any other act of Government. In this particular instance, as in all others, if the Sovereign decides to take issue with the Minister of the day, and not to follow advice to which that Minister adheres, she must find someone else who will advise her as she wishes, she must act on the advice of some Minister responsible to her people. The principle of the British Constitution applies to this just as much as it applies to any other prerogative; and therefore this, in common with all other prerogatives, is to be exercised with responsibility to that British community which is affected by the act.

I have pointed out to your Lordships some reasons why, in the general sentiment, this prerogative has been, up to a later date than others, loosely considered as more personal to the Sovereign, throughout the British Dominions, within the British Isles, as well as elsewhere.

There is, perhaps, an additional reason why it for a time appeared in our own Colonies to be one more personal to the Sovereign; and to be exercisable by her representative, independently, or otherwise in communication with Her Colonial Secretary. In truth, the general notion as to local action on this subject, may be said to have rather retrograded than advanced after the American Revolution. As I said yesterday, the old Colonies exercised the prerogative before the Revolution. It may be suggested that at that time the necessity of the case demanded it. In that age the communication between the old and the new world was very infrequent; and the time occupied in transmitting intelligence was very long and very uncertain. With the facilities for speed in communication, that difficulty was, if not altogether dissipated, at any rate diminished. So again, after the Revolution, although the particular point upon which the Rebellion mainly turned, that, namely, of taxation, was at once and forever abandoned, still our own remaining Colonies, so far as their English-speaking population was concerned, were composed, as I have said, very largely of United Empire Loyalists, imbued with the very strongest sentiment of loyalty to the Sovereign, with the very strongest feelings of abhorrence for rebellious action; and naturally disinclined to complain of, if not rather inclined to welcome any exercise of prerogative power which did not greatly and prejudicially affect their tangible interests. As to that portion of our Colonies whose population mainly consisted of the conquered subjects of France, those people were few in number, and isolated in position; and they had been accustomed to a much less measure of liberty than the English; so that the characteristics of the population of the colonies, the smallness of their numbers, the rudimentary nature of their institutions, and all the elements which surrounded the Queen's empire in this northern part of the continent, conduced to ignorance of and indifference to the growth of changed popular views as to the exercise of this prerogative elsewhere. And, so far as England, in her relationship to these Colonies, was concerned, there was, of course, the natural feeling, which perhaps is not wholly extinct to-day, that, if we would only allow them, they could govern us much better than we could govern ourselves; that we were not fit to exercise all the arts of government. And besides there was a natural clinging to the form of power, a natural clinging which, in the case of England, has been intensified by peculiar circumstances affecting her dealings with her numerous Colonial possessions. She has had one Imperial office, and one set of permanent officers, with one political head, administering that portion of control and power which the British Constitution, fluctuating as it does from time to time, confers over a very large number of dependencies; which dependencies are themselves in various conditions of forwardness with reference to self-government. Some are governed as purely Crown colonies; in some there is an Executive Council in which the Crown predominates; while in others there are representative institutions more popular than these, but still with a more limited range of power than exists with us. It was natural then that the Colonial office, dealing with these various kinds of dependencies, and exercising great and real power over some, should cling to the notion that the exercise of such power was an object as to all; and was to be guarded to the uttermost.

Burton, J—I do not exactly remember how the thing stood before 1840. There was a Lieutenant-Governor for this Province, but I was under the impression that there was, under the constitution of that day, a Governor-General.

Counsel—I think there was the Governor of the Province of Canada, who was the Governor of Quebec, and Lieutenant-Governor for the Upper Province.

Burton, J—And how was the pardoning power at that time? Did the Lieutenant-Governor at that time exercise the pardoning power?

Counsel—My researches were from the Act of Union down; I did not pursue my enquiry further back.

Burton, J.—Of course, he was appointed by the Crown, but he was only Lieutenant-Governor.

Mr. Irving—The last was Lord Sydenham, and he was Governor-General of Upper and Lower Canada, and he being here opened this Parliament as Governor-General.

Hagarty, C. J.—Yes, I regret to say I can remember it very well.

Mr. Robinson—There was no statutory provision.

Counsel—Before I close I will give your Lordships a reference to such statutory provisions as I have been able to find.

As I have said, all those conditions which clouded a clear perception of the character of this prerogative, and of the method in which it should be exercised, are now changed, and all is now plain; but with reference to certain remote eventualities as to Canada, and to some even more remote as to the Provinces, there may remain today the possibility of the existence of Imperial considerations; theoretically, at any rate, Imperial interests may at some time be concerned; and I think the only exception which can now be held to exist, the only modification which can now be held to apply to the exclusively local exercise of the prerogative is in the possible case of an Imperial interest, arising from the execution of some local law against some subject of a Foreign Power in a manner which gives, in the view of that Power, concurred in by the Imperial authority, just cause of offence. In that view, theoretically speaking, technically speaking, speaking of possibilities, it may be said that there is an Imperial interest, which perhaps may not necessitate, but which perhaps may after all be served by the reservation of a right to exercise in such cases the prerogative of the remission of sentence. It is this, and this only, as I will shew your Lordships more at large in a moment, which confessedly now remains as a subject of possible consideration; and from an early period the fact that Imperial interests might arise, while, as a general rule, local interests alone existed, was recognized in custom, and also by Statutes. This circumstance it is, which explains certain specialties of former legislation; and which rendered it perhaps not unfitting, that, carrying into all its elements the very great caution which has pervaded the mind of the framer of this particular statute, he should have saved the Royal Prerogative even here and now.

But, it is needful to remark that, with reference even to this exercise of this prerogative, the general proposition that the prerogatives of the Crown are held in trust for the people, and that the people's interests must be secured by the application, to all existing and active prerogatives of the Crown, of the principle of responsible government, applies; and that in this case, as in other cases, the diminution or extinction of the personal authority of the Crown may take place without any positive action; by mere inaction; by simple disuse. There is nothing more remarkable, and nothing more instructive, than that circumstance. You may turn to the greatest prerogative, perhaps, which the Crown ever had; and you will find that, according to the concurrent judgment of all constitutionalists, it has disappeared; and that by no Act of Parliament, but by simple disuse; and that too by disuse which, having regard to the nature of the rights of the Crown, and the historic circumstances of the case, has been of no very long duration. I refer to the prerogative of exercising an adverse judgment on Bills presented for the Royal assent. It is now held that that prerogative, which was actually used by the monarch of the Revolution, has become for all practical purposes, non-existent, simply by reason of its disuse; and in its place was substituted a great amelioration. If the Sovereign thought that he ought not, without exerting the reserved powers of the Constitution, to agree to any proposed measure of legislation, then instead of waiting until that measure had passed all its stages, and was presented to him for his assent, and thus coming early and perhaps needlessly into collision with the settled and final judgment of both the law-making Houses, he might invite his Ministers to oppose the Bill. If they did not choose to take the responsibility of resisting, he might, if it pleased him to go further and take graver steps, seek other Ministers, who would assume the responsibility of resistance; and he might thus obtain, by the means of responsible Ministers who were answerable for their course, a defence against what he conceived to be erroneous legislation. If that defence seemed about to fail; if he saw that the judgment of the popular House was after all in favor of the measure; and if he thought, advised by his new Ministers, that the judgment of the House did not represent the real feeling of the nation, and that the issue was important enough to render proper a recurrence to the sense of his people (to use the well-worn phrase), then he might, on advice, dissolve; and ultimately the settled will of the people as expressed at the polls would decide the question, and the law, if passed by the new House, would be assented to. Thus collisions were as far as possible to be averted or postponed; the monarch was thus to take all possible precautions, consistently with his constitutional position, for the final settlement and ascertainment of the popular will; that being ascertained, to that he was to yield. So you see that by a gradual process, not embodied in any Act of Parliament, not formulated in any resolution, but by disuse on the one hand and the growth of new customs upon the other, the greatest prerogative of all actually perished. And indeed a like process has been rapidly limiting, or has already destroyed, the powers of the monarch to press even to the narrower extent and by the more constitutional means I have sketched out—to press to the extent of dismissal or dissolution, though under the shelter of advice, his personal opinions. Similar modifications are traceable throughout the body of the constitution; sometimes by limitations on the practical exercise of the power; generally through a recognition of the fact that the prerogative has become so largely the property of the party for the time being in power; and universally by the application of the general principle of the constitution, namely, that the prerogative however active can be exercised only under advice.

Well, the notions I have mentioned as to pardon lingered here for some time; and the Imperial interests to which I have referred were, of course, deemed to be of greater consequence, and the danger of their neglect thought to be more serious in earlier than in later days; but they came down to our time; and there has been considerable discussion and controversy upon the subject of prerogative generally, and upon the subject of this prerogative in particular.

To glance at it historically with reference to our own constitution, so far were those who framed the constitution from supposing that there was any difficulty in the exclusive exercise by the Provinces of the prerogative of pardon in all cases, including crime, that, as my learned friend has said, the Quebec resolutions proposed that it should, on grounds of convenience, be dealt with exclusively by the Lieutenant-Governors of the Provinces. In the then state of sentiment as to this prerogative, that proposition did not wholly commend itself to the Colonial Secretary of that day; and the Act of Parliament was framed, not

vesting the prerogative in express terms one way or the other, but omitting the proposed article, and leaving the matter to be settled under the general terms of the statute.

Then came, at a later day, the question of the principle upon which this prerogative should be exercised by Canada; and the old clause was for some time continued in the commission or instructions to the Governor-General, directing him in capital cases not to act necessarily upon the advice of his council; to obtain their advice, but not necessarily to act upon it.

Then arose an animated and protracted discussion in and with some of the Australian Colonies, as to the principle upon which this prerogative should be exercised; whether it was to be exercised by the Governor of the Colony independently of or, at any rate, not necessarily following the advice of his Ministers; or whether it was to be exercised according to the principles of responsible government. There was a long correspondence; the views of the Home authorities were invoked; and they sent certain despatches. Meantime there came up, here in Canada, a question as to another prerogative power of our Governor-General, the power of disallowance; and it appearing that in a particular case the Home Secretary had sent a despatch to the Governor of the day, intimating his opinion that the power of disallowance was a prerogative which he was to exercise personally, not following the advice of his Ministers, the question was raised in the Canadian Parliament; and a resolution was proposed affirming, as applicable to the exercise of that prerogative power, the principle of the Constitution; namely that it could be exercised only under advice. That resolution, though withdrawn for the moment at the instance of the Government of the day, was so withdrawn after an expression of entire concurrence in its views by Sir John Macdonald, then in Opposition; and after a practically unanimous expression of opinion in its favor, withdrawn only upon the representation that the government was in communication with the Imperial authorities upon the subject of that despatch. That correspondence after some time reached a point at which the Colonial Secretary transmitted the Australian correspondence on the prerogative of pardon, as indicating the grounds which he thought applicable to the exercise of the prerogative of disallowance. Lord Carnarvon thought that the prerogative should be exercised *after* advice, but not necessarily *upon* advice; and he thought there were very good reasons, which he had given in his despatches about the prerogative of pardon, why it would be to the advantage of the Colony if a little "*Deus ex Machina*" were set up in the shape of the Governor of the day, who should personally dispose of these matters, no one being really responsible to the Canadian people for such disposition; that was his suggestion. To it the Canadian authorities made answer, opposing that view; and I refer now to the print of official correspondence put in, as showing your Lordships the way in which the suggestion was met, and the practical results.

The earliest paper is the report approved by Council, and transmitted to Lord Carnarvon, indicating the view of the Canadian Government upon the exercises of the prerogative; and at page 4 your Lordships will find the view expressed as to the vital necessity of Ministers concurring in, and being responsible for whatever was done, or not done, upon the matter. Page 5 points out

that the question involves simply the application to a plain statute of the well-settled rules of construction, and the application to a plain case of the fundamental principle of the constitution,

viz., that of responsible Government; and, it takes certain distinctions which had been raised as to the prerogative of pardon; and which, therefore, rendered discussion of that subject in its details irrelevant to the discussion of the subject in hand; but it adds that

it is not possible to deal with this power on principles different from those which apply to the exercise of the other powers of Government conferred in like terms by the statute. Thus the discussion involves the whole question of responsible government, and if the rule proposed by Lord Carnarvon is conceded, it would be impossible to resist its application to our entire system.

After discussing Lord Carnarvon's proposed rule, it shows that

Ministers are in truth responsible, not merely for the advice given, but for the action taken; that the Canadian Parliament has the right to call them to account, not merely for what is proposed, but for what is done; in a word, that what is done is practically their doing. The importance to the people of the advice given by Ministers is in precise proportion to its effectiveness. So long as the course pursued is dependent on the advice given, responsibility for the advice is responsibility for the action, and is therefore valuable; but it is the action which is really material; and to concede that there may be action contrary to advice, would be to destroy the value of responsibility for the advice—to deprive the people of their constitutional security for the administration, according to their wishes, of their own affairs—to yield up the substance, retaining only the shadow of responsible government.

And the conclusion was that the Colonial Secretary should be informed that

in the opinion of the government, no action could be taken on the question, save by and with the advice of Ministers who are responsible to Parliament for such action.

Further correspondence ensued; but the end was that the Colonial Secretary, without saying so, yielded; and since then it has been the common understanding of all parties, including the Home authorities, that this power of disallowance, vested in the Governor-General, is a power and prerogative to be exercised upon advice, and only upon advice.

Now, as I said, the principles of action which Lord Carnarvon had propounded for the assent of the Canadian authorities, principles which would have subverted responsible Government, were by him originally propounded with reference to the case of the prerogative of pardon, though he was at the moment applying them to the prerogative power of disallowance; and shortly afterwards that question of pardon itself came up directly, because a draft general form of Commission and of Instructions, proposed to be applied to the future Governors-General of Canada, was sent out for the consideration and observations of the Government; and subsequently the Minister of Justice of that day was authorized to communicate with Lord Carnarvon upon this very question.

At page 9 your Lordships will find a statement of the grounds which, with the authority of the then Government of Canada, were laid before Lord Carnarvon, in the general, and in the special view. That statement indicates that not merely the forms which were proposed, but even those at that date existing were felt to be unsuitable; and it states the proposition, which I have already advanced to your Lordships, that there were differences in the constitutions and circumstances of the different dependencies of the Empire, en-

titling some of them to a fuller measure of freedom than others, and entitling the Dominion of Canada prominently, principally, most of all to ask special consideration, and a more free and full application of the principles of responsible government—even the fullest measure of freedom in local political government.

Well, after that general observation, the tenth to the fourteenth pages deal with the question of the Commission and Instructions on the subject of pardon; and it is there suggested that the subject of pardon is, in effect, a branch of Criminal Justice; that it has been rightly assumed to be within the legislative powers of the Parliament of Canada; and various statutes are referred to. After some details, not necessary to be now considered, on page 11 the chief question is brought forward, that arising on the instruction given to the Governor that he is, in capital cases, to extend or withhold a pardon or reprieve according to his own deliberate judgment, whether the members of the Council concur in it or otherwise. It is pointed out that there is no ground of reason upon which this distinction can be applied to capital cases; and that the only ground of reason, the only tenable distinction, is between cases, whether capital or not, which may involve Imperial interests, and those which, not involving such interests, concern solely the internal administration of the affairs of the Dominion. After a discussion of the method of dealing with the cases which may involve Imperial interests, it is argued that (saving and providing for those cases in what manner may be thought fit), they are after all infinitesimal in number; and that the general bulk come within the ordinary rule. A contest is then entered upon as to the reasons alleged for the non-application to the Governor-General, in his exercise of this prerogative, of the limitary rule that it must be exercised under advice. These reasons are repeated, namely, first, that this is a personal delegation to the Governor, who cannot in any way be relieved from the duty of judging for himself in every case in which the prerogative is to be exercised, and so forth. Reference is then made to the report, from which an extract is made, upon the question of disallowance; and then additional arguments are advanced. It is pointed out that

> the prerogative of pardon has been rightly vested in the Sovereign by statute, since criminal offences are against her peace or her Crown and dignity, and it is reasonable that the person injured should have the power to forgive; but neither the punishment of these injuries nor their forgiveness (both being matters which affect the people) is arbitrary; the one can be, and accordingly is, regulated principally by law, though a wide discretion as to the punishment is given in many cases to the Judge; the other being mainly beyond the province of law, is yet, like the remaining prerogatives of the British Sovereign, held in trust for the welfare of the people, and so far as it is beyond the province of the law, is regulated by the general principle of the Constitution.
>
> There may in this, as in other instances, be some difficulty in running out an exact analogy between the position in Canada and in England; but I venture to suggest that the application to this subject of the fundamental rule of the Constitution, as expounded in the report referred to, affords the true solution of the question, and would furnish the nearest possible analogy between the practice to be pursued in each country.
>
> In the United Kingdom, while the British Parliament makes laws for the punishment of crimes committed by the inhabitants, the Sovereign exercises her prerogative of mercy towards such criminals, under the advice of her Minister there, who is chosen as other Ministers are chosen, and is responsible to the British Parliament for his advice. Therefore, in the United Kingdom, this power is exercised under the same restraints and with the same securities to the people concerned as the other powers of government.
>
> This, it seems to me, is the practical result which should be obtained in Canada.
>
> There, while the Canadian Parliament makes laws for the punishment of crimes committed by the inhabitants of Canada, the Sovereign should exercise the prerogative of mercy towards such criminals under the advice of her Privy Council for Canada, or of her Minister there, chosen as her other Canadian Ministers are chosen, and responsible to the Canadian Parliament for his advice; nor, having regard to the reasons given in the report already referred to, can it be conceded that the suggested responsibility of the Governor to the Colonial Office for the exercise of this power, independent of, though after, advice, would be a satisfactory substitute for the responsibility to the Canadian people of a Minister charged with the usual powers and duties in this respect.

The second argument of Lord Carnarvon, which was that of political expediency, the general argument that we are unequal to the position and functions of government, that pressure would be brought to bear on the Executive, and that it would be very much for the better, and greatly to our advantage, if we would allow other people to manage our business for us at their pleasure, is then discussed.

Now, your Lordships will observe the principle here laid down on behalf of Canada, a position to which I attach importance, because it has been accepted; because it has been agreed to; because the Commission and Instructions have been altered in accordance with it; because it has become therefore the settled rule, and that after a more definite and satisfactory fashion than many rules of the British Constitution; because the attempt to deal with any ordinary cases, to deal with any case except where Imperial interests may be involved, was, upon these remonstrances, abandoned; and because it is now practically, I may say formally, conceded that the prerogative is to be exercised according to the rule we then propounded. What is that rule? It is the precise rule I ask your Lordships to lay down to-day. It is the rule that settles this case now before you. There, it was contended that the Canadian Parliament made the criminal laws; that they were made by the Canadian Parliament for the Canadian people; that they were to be administered by an Executive responsible to the Canadian people; that of them the prerogative of pardon for crimes was part; that it was a branch of criminal justice; and that as such it was to be administered by persons responsible to the people concerned. So—exactly so, here! With reference to the Provincial laws, providing Provincial sentences for Provincial offences, precisely the same analogy applies; and precisely the same result should ensue; and thus that body politic, that community which, in each case, makes the law, creates the prohibition and defines the punishment, which administers, which enforces the law, is the body politic to which the Ministers advising the exercise of the prerogative as a branch of the administration of justice must be responsible.

I also advert to the part of the report which refers to the proposed "Royal Instructions" at page 14, dealing with a somewhat astonishing attempt to authorize the Governor to act in certain cases in opposition to the advice of his cabinet. Here, once again, a statement of the constitutional rule was attempted, a statement which derives, I am quite ready to admit, its main value from the fact that it was accepted by the other side to the controversy, the Home authorities, has been accepted without demur by all parties on this side of the Atlantic, and therefore, may perhaps be taken accurately to express the reading of the constitution. Your Lordships will find at page 17 the

proof of my last statement, in the remark made as to the framing of the drafts which were transmitted, and which are, with some slight changes, made at the suggestion of the Canadian Government, in the direction of self-government, the drafts adopted :—

> In framing these drafts every endeavor has been made to meet the views expressed in the memorandum drawn up by Mr. Blake and the sub-committee of the Dominion, which was enclosed in your despatch of the 6th April last, and in the further memorandum received from Mr. Blake in this country.

So that the question was settled upon the line which these papers shew to your Lordships, and therefore, we have a satisfactory exposition, concurred in by the political department of the country immediately concerned, and by the Imperial Government, in favor of the existence and applicability of the fundamental principle of the constitution, not merely as to the prerogative of disallowance, but also as to the prerogative of pardon; and all that now remains for us to do is to run out the analogy in the case of the Province, and to deal out to the Province just the same measure of political liberty, in this regard, which it is entitled to in all other regards.

The next important document which is to be found in this paper is the despatch of the Colonial Secretary at page 19, with reference to the Letellier case; and I allude to that also as markedly indicative of the growth and present establishment of the constitutional principle. You find in the fifth paragraph a statement of the position of a Lieutenant-Governor, according to the view of the Home authorities; and in the sixth paragraph a statement as to the position and functions of the Governor-General; and you find also a statement of the position and functions of the Home authorities, as to the action of the Governor-General. You find it stated that the Lieutenant-Governor has a plain right, if he feels it incumbent upon him to do so, a constitutional right to dismiss his Provincial Ministers; you find it stated that the Governor-General is bound to act upon the sustained advice of his own Ministers, although it may be opposed to his own opinion, as to whether a Lieutenant-Governor should be dismissed or not. You find it further stated that with that matter the Home authorities have no concern whatever; that, although they offer their answer to Lord Lorne in an abstract case because he asks it, yet they do not interfere at all, because the matter must be worked out by ourselves under our constitution, the Colonial office formally abandoning all intervention in internal matters.

The Canadian Government and Parliament adhered to their view that a Governor had no longer, under the development of the British constitution, the right to dismiss Ministers who retained the confidence of the Legislature, and that his act, although endorsed by the people, involved his own dismissal from office. Until very lately this precedent was supposed to have settled that question for Canadians; but it has just recurred in an unexpected form, and on the issue so joined some combatants have changed sides.

The Letellier case, however, marked an important advance. It declared and emphasized the existence of constitutional conditions under which the independent action of a constitutional Governor was brought within very narrow limits, and his obligation to give his entire confidence to, and cheerfully follow and second the advice of his Ministers, so long as they were sustained in Parliament, was manifested, and the full responsibility of those Ministers for all acts of government was, of course, in the same degree accentuated.

That was the condition of things made plain by the Letellier case.

And that condition of things was reached after experiences which were perhaps rather painful and humiliating; because, not very long before, there had been an attempt to evoke the "God out of the machine," in this very matter of pardon, with reference to a crime which had in it some of the elements of a political crime, the murder of Scott. Lord Dufferin had assumed that the matter had passed beyond the province, as he expressed it, of Departmental administration, and had himself given a direction to his Minister to prepare and pass an instrument, commuting the sentence of death passed upon Lepine on certain terms which he thought satisfactory. Lord Dufferin's conduct was approved by the Colonial Secretary; and there was a very animated debate upon it in the House of Lords. Several Peers who had formerly been Governors of Colonies, and one or two former Colonial Secretaries, took part in that discussion; and there was a chorus of applause as to the wisdom of Lord Dufferin's course, and much sage remark on the high value and importance to a colony of this independent action of a Governor, showing how greatly the local politicians were relieved by it, and how very much better it was that things should be so managed *for*, instead of *by* the Colony. Lord Dufferin, himself, sent, early in the business, despatches, which are to be found amongst the papers, containing newspaper extracts indicating that the results had justified his action. But, what happened? Why, within three months of that day it was found that it was too late to evoke in our affairs "the God out of the machine;" it was found absolutely necessary for the statesmen who were responsible to the people of Canada to assume the responsibility of the government of Canada in that very particular. It was found necessary for them to take up that responsibility themselves, hampered and complicated as the question had become by the events to which I have referred; to take the responsibility of actually effecting a different disposition of the case from that which had been under such favorable auspices made by Lord Dufferin. The mode they adopted was, in substance, though not in form, that of the Act of Grace; they proposed, upon their own responsibility as Ministers, and they invited the House of Commons to assent to, an Address to the Crown stating reasons why in their opinion a particular course should be pursued in the case of the persons concerned in the Scott affair, and requesting that that course should be adopted. And it was adopted; we disposed of that matter in our own way.

Well, that settled the question as to Pardon; it settled it forever; for a few years later a like matter came up, in which one of the actors in the earlier affair had been concerned; and which created a degree of political excitement very much higher than the earlier—I refer to the question of Riel. And then, as your Lordships will remember, so conclusively had the former transaction demonstrated the truth of the proposition that the Canadian people would and must have their own affairs settled solely by persons responsible to themselves, that, embarrassing as the question was, there was not the slightest sug-

gestion on the part of a single individual, from the highest to the lowest, that it should or could be settled otherwise than on the responsibility of the Canadian Ministers, they giving their advice to the Governor-General, and he acting on that advice. In all the course of that agitating discussion, conducted in the press, through the country, and in Parliament, there was not the remotest hint that it was possible to repeat the earlier phase of the Lepine operation, or to get rid of the difficulty by the patent plan which had then so lamentably failed.

HAGARTY, C. J.—How did the difficulty arise there? It was merely a question whether the sentence of law should be carried out. There was no intervention of the pardoning question at all, was there?

COUNSEL—Yes, my Lord.

HAGARTY, C. J.—The sentence was the sentence of death. Well, if nothing had been done it would have been carried out.

COUNSEL—Surely.

HAGARTY, C. J.—How did the question arise?

COUNSEL—The question whether the Executive ought to exercise the prerogative of commuting or remitting a capital sentence always arises; and as to the North-West, the law made special provision. Your Lordship is aware, no doubt, that rather less than one-half of all capital sentences are executed.

HAGARTY, C. J.—Oh, you may say one-third.

COUNSEL—Unless things have changed since the time of Riel, I have stated it accurately.

HAGARTY, C. J.—I was a great many years a Judge in criminal matters, I tried an immense number of capital cases; only very few sentences were ever carried out.

COUNSEL—Statistics of them are in a paper which will be handed in. It is enough to say that, in at any rate the majority of cases, the capital sentence is not carried out. And, as that paper shows, the reason is plain; namely, because in capital cases, and in those cases only, the sentence which the Judge is obliged to give is the maximum sentence for the crime. In all other cases he is allowed a discretion, and he attempts to fit the punishment to the crime. But, where he comes to the capital sentence, there he must give the maximum sentence of the law; and it is consequently well understood to be the duty of the Executive to consider and to moderate; to do that which in other cases the Judge does; to moderate and to fit the punishment to the crime; and it so happens that capital punishment does not, in the view of the country at large, fit the crime in the majority of instances. It is the same in England; about one-half of the capital sentences are executed.

What I say is this, that with reference to Lepine first, and to Riel later, each of whom stood under sentence of death, the question came up in the most formal manner, as to whether the sentence should be commuted; and by whom; and how; and under what circumstances; and we have a most vivid illustration of the rapid growth and development of sound constitutional principles, when we look at the attempt that was made in Lepine's case; the failure of that attempt; and the unanimous adoption, in the later and greater and more difficult case, of the view that the affair should be settled on the responsibility, and the sole responsibility of the Ministers of the people concerned.

Thus I claim to have shown clearly that the fundamental principle of the British Constitution is responsible government; that the principle extends and applies to the exercise of prerogative powers; that its application includes the prerogative of pardon; that this principle, thus extended and inclusive, applies to the constitutions of Canada and the Provinces, each in its own domain; and that its enforcement requires that the Province which makes the law and provides the sanction shou'd also, through its responsible Ministers, decide to what extent the sentence of the law shall in any given case be executed or remitted; and forbids that any other power should be allowed to meddle with the law, impair its effectiveness or control its administration, by altering the sentence it provides.

I now ask your Lordships, without reading it, to be permitted to make part of my argument, the paper commencing at page 25 of this print, being the despatch of the Lieutenant-Governor of Ontario to the Secretary of State, with reference to the Queen's Counsel case, to which my learned friend referred. A large portion of this state paper has regard to the specialties of the Queen's Counsel case, and with that I do not ask or propose at all to trouble your Lordships A part refers to the circumstances under which the decision in *Lenoir v. Ritchie* was reached, and the dicta in *Lenoir v. Ritchie* were uttered, and to that I ask your Lordships to refer in order to save the time I should have to take in stating those circumstances. On the 32nd page commences a general argument upon the question of Provincial rights, in matters of prerogative, of the highest value, containing historical statements, and chains of reasoning to which I desire to attract your Lordships' attention, and which in order to save time I ask your Lordships to permit me to make a part of my argument.

In the result the remote but possible case of Imperial interests is fully met by the saving of Her Majesty's prerogative, which enables her to act in any case in which she thinks that the peace and the foreign relations of the Empire might be imperilled by the execution to the full of an undue sentence against some subject of a foreign power. In the result therefore you have here to deal with domestic and internal concerns alone; and that which is domestic and internal, *ex concessis*, concerns only the people of the Province of Ontario. It is *their* law, *their* power of self-government, *their* plan for effectuating their laws, *their* method of tempering justice with mercy, (if that be the proper phrase, but I prefer to say of accurately carrying out the intent and spirit of their laws); it is *their* concern and *theirs* alone, which this power touches. To whom then, and to whom alone should this power be committed? To whom, under constitutional principles? To whom, according to the light of reason? Whichever way you look at it, from whatever point of view, the answer is the same; to the people of Ontario. It is a branch of the administration of justice; it is a part of the imposition of punishment; it is a condition, without which the imposition of punishment may itself involve injustice; it is an essential element in the operation of the law; it is the completion, to its full extent, of the work of the Local Legislature, dealing with a local offence, in which a local public is interested, the prohibition for which is created by a Local Legislature, the punishment for which is provided by a Local Legislature, the modifications of which punish-

ment are, therefore, also to be provided under the authority of the same Legislature.

Besides, there are other ways of dealing with this matter, confessedly, even as to crimes, within the local power. There is the *nolle prosequi*. Who directs a *nolle prosequi?* The Attorney-General of Ontario. There is the right and custom that the local law officer of the Crown, if he deems the interests of justice will be best so served, may abstain from offering evidence upon a trial, and thus secure a verdict of not guilty. By whose authority? That of the Attorney-General of Ontario. All that may and must be done by the local authority. But, if those methods of practically exonerating from the consequences of the Provincial law have not been adopted, and if the question is whether the sentence has been excessive, or whether the conviction has been mistaken, or whether the condition of the prisoner is such as to render commutation necessary to justice—if any of these questions arise, then I say that with regard to them, as with regard to the others, the local authority alone can deal.

I told your Lordships that I would refer to some statutes which seem to me to throw some light on the matter, and which should be stated before the argument is closed,

The Act of Union, 3 and 4 Vic., Imperial, Ch. 35, the Act reuniting the Provinces provided that:—

> notwithstanding anything in the Act contained it should be lawful for the Queen to authorize the Lieutenant-Governor of Canada to execute within any parts of the Province, notwithstanding the presence of the Governor, such of the powers, functions, and authorities, as well judicial as other, which before, and at the time of passing this Act, vested in the Governor, Lieutenant-Governor, or person administering the Government of the Province of Upper Canada and Lower Canada respectively, or of either of them, and which, from and after the said reunion of the said two Provinces, shall become vested in the Governor of the said Province of Canada; and to authorize the Governor of the Province of Canada to assign, depute, substitute, and appoint any person or persons jointly and severally to be his deputy or deputies, within any part or parts of the Province of Canada, to perform and execute such of the powers, functions and authorities, as he pleases.

The statute of Canada, 4 and 5 Vic., 1841, ch. 24, Sec. 48:—

> And be it declared and enacted that where the Queen's Majesty, or the Governor, Lieutenant-Governor, or person administering the government of this Province for the time being, shall be pleased to extend the Royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under the Royal Sign Manuel, counter-signed by one of the principal Secretaries of State, or by warrant under the hand and seal at arms of such Governor, Lieutenant-Governor, or person administering the government as aforesaid, shall grant to such offender either a free or a conditional pardon, the discharge of such offender out of custody in case of a free pardon, and the performance of the condition in the case of a condition of pardon, shall have the effect of a pardon under the Great Seal.

There your Lordships find what I said I would shew. I said I would shew you the existence of the notion that convenience might be served by a concurrent exercise of this prerogative, by the possibility, at any rate, of a concurrent exercise. There you find preserved that concurrent power in the Queen, presumably on account of the possible Imperial interests to which I have referred. Take our relations with the United States. On more than one occasion it has happened that Imperial intervention has taken place, intervention which may be called in a sense diplomatic, with reference to sentences imposed upon persons who had invaded the peace of the country; notably in the case of the Fenian Raid, after which a very large number of persons, citizens of the United States, were convicted, and severely sentenced; but on very strong representations made by the Imperial authorities, their sentences were, within a brief space, commuted by our Ministers, not perhaps very much to the taste of the people of Canada.

Your Lordships recollect the communications which passed at an earlier period, 1837-1838, with reference to the political crimes of those days. The Imperial prerogative, therefore, was maintained; but not exclusively. The scheme, as I ask your Lordships to determine, was this. It may be important to preserve the Imperial right to act where Imperial interests are concerned; But in nine hundred and ninety-nine cases out of a thousand, no such interests can exist; and wherever they do not exist, then the right is exclusively in the local authority; and that authority is the Governor, Lieutenant-Governor, or person administering the government of the Province.

Thus, you find an Act of Parliament at this early date of '41, recognizing the existence, in the Lieutenant-Governor of the Province, of the power to pardon, and providing that his action should have the effect of a pardon under the Great Seal.

In the same year, ch. 35, sec. 61:—

> And be it enacted that it shall be lawful for the Queen's Majesty, and for the Governor, Lieutenant-Governor, or person administering the Government of the Province, to extend the Royal mercy to any person imprisoned by virtue of this Act, although he shall be imprisoned for non-payment of money to some person other than the Crown.

The Royal prerogative did not extend to taking away a private right; but here is an Act which extends to that case; and how is the power given? To the Queen's Majesty; and also to the Governor, Lieutenant-Governor, or person administering the Government.

HAGARTY, C. J.—They kept up the same words down to the last Criminal Act of the Dominion.

COUNSEL.—Yes, my Lord; your Lordship sees you get the "Queen," and you get also the "Governor."

Then comes the Consolidated Statute of Canada, 1859, ch. 99, secs. 112 and 113:—

> The Queen's Majesty, or the Governor, may extend the Royal mercy to any person sentenced to imprisonment by virtue of any of the foregoing Criminal Acts, although he may be imprisoned for non-payment of money to some party other than the Crown. * * *
>
> When the Queen's Majesty, or the Governor, is pleased to extend the royal mercy to any offender convicted of a felony,

then it goes on in the words of the section to which I have already referred.

Then, the statute of the Dominion, 32 and 33 Vic., ch. 29 deals with it as the act of the Crown:—

> The Crown may extend the Royal mercy to any person. When the Crown is pleased to extend the Royal mercy to any offender punishable with death,

and so on.

Then so late as 1887, ch. 181:—

> When the Crown is pleased to extend the Royal mercy,

and so on,

> and grant to such offender either a free or a conditional pardon, by warrant under the Royal Sign Manuel, counter-signed by one of the principal Secretaries of State, or by warrant under the hand and seal at arms of the Governor-General,

Then again, ch. 181, sec. 40, Revised Statute of Canada:—

> The Crown may commute the sentence of death passed upon any person convicted of a capital crime to imprisonment

in the penitentiary for life or for any term of years not less than two years, or to imprisonment in any other jail or place of confinement for any period not less than two years, with or without hard labor, and an instrument under the hand and seal at arms of the Governor-General, declaring such commutation of sentence of State, or of the under Secretary of State, shall be sufficient authority,

and so on; and

nothing in the Act shall in any manner limit or affect Her Majesty's Royal prerogative of mercy.

There, you still get the notion of a double power. Then, of the Provincial Statutes I refer your Lordships to the Revised, ch. 1, sec. 30:—

Where a pecuniary penalty or a forfeiture is imposed for a contravention of any Act, then if no other mode is prescribed for the recovery thereof, the penalty or forfeiture shall be recoverable with costs by civil action or proceeding at the suit of the Crown only, or of a private party suing as well for the Crown as for himself, in any form allowed in such case by the law of this Province, before a Court having jurisdiction to the amount of the penalty in cases of civil contract, upon the evidence of one credible witness other than the plaintiff or party interested. If no other provision is made for the appropriation of the penalty or forfeiture, one-half thereof shall belong to the Crown and the other half shall belong to the private plaintiff, if any there be, and if there is none, the whole shall belong to the Crown.

Sec. 31 prescribes that there may be recovery upon indictment.

Sec. 32:—

Any duty, penalty or sum of money, or the proceeds of any forfeiture which is by any Act given to the Crown, shall, if no other provision be made respecting it, form part of the consolidated revenue fund of this Province and be accounted for and otherwise dealt with accordingly.

Is that law? Have we the right to do that? Here is a penalty inflicted in pursuance of our so-called Provincial criminal jurisdiction; and it is provided that the fine shall form part of our consolidated revenue fund. That is surely within our power. Then cannot we do what we will with our own money, which is part of our own consolidated revenue fund? Cannot we decide to give back the money, or a part of it; or to remit a portion which ought to be but has not yet been paid in to our consolidated revenue fund? If the Legislature can do that, can it not authorize the Executive to do it? Is not that clear? And yet, that is just what this Act proposes,

Sec. 33:—

If any sum of the public money is by an Act appropriated for any service, or directed to be paid by the Lieutenant-Governor—then if no other provision is made respecting it, such sum shall be payable under warrant of the Lieutenant-Governor directed to the Treasurer of the Province, out of the consolidated revenue fund.

That surely is within our power. Yet my learned friends may perhaps complain that we are giving additional functions to the Lieutenant-Governor!

R. S. O. ch. 20, secs. 25 to 27:—

Whereas it is expedient that the Executive Government should be empowered to relax the strictness of the laws relative to the collection of the revenue in cases where without such relaxation great inconvenience or great hardship or injustice to individuals could not be avoided.

Therefore, the Lieutenant-Governor, whenever he deems it right, and conducive to the public good, may remit any duty or toll payable to Her Majesty, imposed or authorized to be imposed by any such Act, for any contravention of the laws relating to the collection of the revenue, or to the management of any public work producing tolls or revenue although any part of such forfeiture or penalty be given by law to the informer or prosecutor, or to any other person; and such remission may be made by any general regulation or by any special order in any particular case, and may be total or partial, conditional or unconditional; and if conditional and the condition be not performed, the order made in the case shall be null and void, and all proceedings may be had and made.

If the Lieutenant-Governor directs that the whole or any part of any penalty imposed by any law relating to the revenue be remitted or returned to the offender, such remission or return shall have the same effect as a pardon has in the case of a criminal offence, and the offence for which the penalty is incurred shall thereafter have no legal effect prejudicial to the party to whom the remission is granted.

Her Majesty's Attorney-General for Ontario, or other law officer, may sue for and recover in Her Majesty's name any penalty or forfeiture imposed by any law relating to the revenue before any Court or other judicial authority before such penalty or forfeiture is recoverable under such law, or may direct the discontinuance of any action for such penalty, by whom or in whose name soever the same has been brought, and in such case the whole of the penalty or forfeiture shall belong to Her Majesty for the public use of the Province, unless the Lieutenant-Governor in Council allows, as he may if he sees fit, any portion thereof to the seizing officer,

and so on.

Then Revised Statute, ch. 90, an Act respecting the remission of certain penalties; sec. 90:—

Where a pecuniary penalty or forfeiture is imposed by any Act of this Province, or by any other Act now enforced in this Province within the legislative authority of this Province, the Court or Judge having cognizance of the proceedings may at any time after the commencement thereof, remit in whole or in part any sum of money by such Act imposed as a penalty or forfeiture on a convicted officer.

There is a case in which it was thought fit to give the power of remission to another than the Executive.

HAGARTY, C. J.—There was a singular process as regards escheats. The Court could remit.

COUNSEL.—Yes, my Lord. Here you find the procedure for the attainment of justice perfected after the fashion the Legislature thought most appropriate to the purpose. Here they thought it was expedient to give to the judicial authority which had been concerned in applying the fine, and which, therefore, would be cognizant of all the circumstances, and would act in a judicial spirit, the power of remitting and in effect of modifying the sentence. Have the Legislature that power? Is not that exercising the prerogative of pardon? What else is it but remission or commutation? The Legislature surely could do that. If they could do that, then this Act is valid.

Then the Act provides:—

This Act shall not be held to give to a police magistrate or justice of the peace the authority herein mentioned.

The Lieutenant-Governor in Council shall also have power at any time to remit any such penalty or forfeiture in whole or in part, unless the same is imposed by the Act respecting the Legislative Assembly, or by some Act respecting election of members of Legislative Assembly, or is recoverable in respect of any offence committed in connection with an election of a member of the said Assembly,

For obvious political reasons it was not thought fit that an Executive formed of one political party, and controlling the councils of the Government, should be permitted to remit sentences in respect of political offences; and so the power as to that is not granted.

That series of Provincial Legislation at once illustrates and corroborates the theory which I advance as applicable to the case. Here, we are a Province with large powers, a political organization, possessing in many respects the characteristics of an independent State, and exercising sovereign power over a large portion of those subjects on which depend the happiness, the peace, the prosperity of the inhabitants. Amongst these is the subject of making and enforcing by fine, penalty or imprisonment laws on a vast range of matters. A part of the machinery for enforcing and dealing with such laws, is that providing for the remission of the sentence, in cases in which justice or expedi-

ency may require such remission. That part of the whole power, therefore, appertains to the Province and must be administered by the Ministers of the Province, under those responsibilities to its people, which are the fundamental safeguards of liberty under the British Constitution.

And now, my Lords, I close the arguments which have occurred to me upon a case, which has led us into paths somewhat unwonted in a Court of Law; yet are they paths which we must traverse when the judiciary is called to the arduous and exalted office of interpreting the constitution of the country.

I am glad to believe that the relevant principles of interpretation are plain and clear; and that they are such as have been stated, with the terseness and lucidity of which he is a master, by the learned Chancellor in the judgment below. I trust that your Lordships will be able to concur in that judgment; to agree that its reasoning applies to and governs the disposition of the cause; and thus to close, so far as the highest Court of this Province can close it, the controversy which has been waged for so many years on the relative position of the Provinces and the Dominion of Canada, by affirming that the terms of the B. N. A. Act grant, and its effective operation involves, the same ample, adequate and sovereign measure of authority in the executive as has, under the decisions of our highest Imperial Court, been accorded in the legislative department of the Provincial Constitution.